No. 532 163

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and Executors of the Last Will and Testament of Charles E. Appleby, deceased,
Petitioners,

—against—

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,
Respondents.

Petition for writ of certiorari to review a decision of the Court of Appeals of the State of New York, and brief in support thereof.

The River and Harbor Act of 1899 (30 Stat. 1151-1155). Bulkhead and pierhead lines. Erroneous interpretation by State Court of said act and authority so as to take private property without compensation and thereupon misapply state legislation which had been repealed or ineffectual. Violation of rights acquired by contract, under the protection of the Constitution of the United States by change of state law, which has been a rule of property for about 100 years.

Retaking by said City for proprietary use in violation of the Constitution of the United States and contrary to state statutes and decisions.

This cause arose in the New York Supreme Court, decision and judgment modified and affirmed in Appellate Division, affirmed in Court of Appeals by decision and opinion conflicting.

BANTON MOORE, Attorney for Petitioners.
CHARLES HENRY BUTLER, Counsel for Petitioners.

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Respondents.

Sirs:

PLEASE TAKE NOTICE, that at the opening of the Supreme Court of the United States on Monday, October 1, 1923 (or as soon thereafter as counsel can be heard), I shall present to the Court the annexed petition for a writ of certiorari to review a decision and judgment of the Court of Appeals of the State of New York and orders and judgment entered thereupon, in the above entitled case, a copy of such petition, and brief in support thereof, being hereby served upon you.

New York, August 25, 1923.

BANTON MOORE,
Attorney for Petitioners,
110 William Street,
New York, N. Y.

To:

GEORGE P. NICHOLSON, ESQ.,
Corporation Counsel.

STETSON, JENNINGS & RUSSELL, ESQS.,
Attorneys for Respondent
Weehawken Stock Yards Company.

IN THE

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1923.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as Executors of the Last Will and Testament of Charles E. Appleby, deceased,

Petitioners,

—against—

THE CITY OF NEW YORK and WEEHAWKEN STOCK YARD COMPANY, impleaded with others,

Respondents.

Petition of plaintiffs for a writ of certiorari to review a decision of the Court of Appeals of the State of New York.

To the Honorable the Supreme Court of the United States:

The petition of Edgar S. Appleby and John S. Appleby, individually and as executors of the Last Will and Testament of Charles E. Appleby, deceased, respectfully shows:

That the Court of Appeals of the State of New York, which is the highest State Court, rendered a final decision and judgment herein, which

(1) Erroneously interprets The River and Harbor Act and the authority of the Secretary of War thereunder, contrary to the wording and intent thereof, and upon such interpretation,

(2) Holds that two State statutes prohibited petitioners from using their property, although the first act (Ch. 763, Laws of 1857) was unconstitutional and repealed, and the second act (Ch. 574 of the Laws of 1871) specifically protected private property, and

(3) Denies relief to petitioners although it was alleged and shown and not denied that the City of New York, under a condemnation proceeding, built piers in the streets and excavated petitioner's land between the streets for slips and basins, according to the City Plan and collects large revenue therefrom.

The facts show a clear retaking without compensation, by said City of the property and rights, which it sold for value, and upon which the City collects taxes, to the extent of $74,426.01 up to the trial of this action.

The ruling of the Court is far-reaching and of grave concern. It is also of public importance that the Federal power and authority here involved, which affects vast property interests, be correctly construed.

The petitioners are the owners of "certain water lot(s) or vacant ground and soil under water to be made land and gained out of the Hudson or North River" (fol. 1100) in the City of New York, between Twelfth and Thirteenth Avenues, West 39th and West 40th Streets, West 40th and West 41st Streets, which their predecessors had purchased for value from said City by two certain deeds in evidence. The City derived its title direct from the State by Legislative act (Ch. 182, Laws 1837) which granted "all the right and title of the people of the State," the highest possible title and right.

This suit was brought to enjoin the appropriation aforesaid and for damages. The Courts enjoined the dredging inside the bulkhead line but refused to provide for compensation or damages for the appropriation, except that in the Appellate Division of the Supreme Court, in the *Matter of Appleby* v. *Hulbert*, Commissioner of Docks (199 App. Div. 552), that Court ordered that in thirty days after entry and service of its order the commissioner to issue a permit to petitioners to improve their property unless the City brought a proceeding to acquire same in which event the writ should be deemed stayed for a reasonable time (fols. 215-219). But the Court of Appeals reversed this order (235 N. Y. 364).

Therefore, the petitioners are deprived of everything except a record title and the burden of taxation. The ruling of the Court, upon which this result was reached is that

> "When the Secretary of War established the bulkhead line, the title of the State, the City and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation" (235 N. Y. 351, 361 and judgment fol. 1654 of Record).

This is not correct. There are valuable pier, wharf and water rights "beyond such line" and inside the pier-head line, which the Court overlooked. This error is apparent from the language of the Federal act and authority, and from the facts of this case.

Section 10 of the River and Harbor Act, *supra*, says:

> "That the creation of any obstruction not affirmatively authorized by Congress, to the

> navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, * * *"

and Section 11 says:

> "That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him. * * *"

In both sections the word "*lines*" is plural.

The Secretary of War, in exercising his authority, caused to be written upon War Department maps, of which an extract for this locality, is in evidence as City's Exhibit C, the following legend:

> "The bulkhead line defines the limit for solid filling; the pierhead line, is the limit to which *open piled structures may be built.*" (Italics ours.)

The Secretary of War established *two* lines here. The bulkhead line across the property in question and the pierhead line far *beyond* it.

It is obvious that the bulkhead line only limited *solid* or earth filling and did not limit the building out to the pierhead line of piers, wharfs and any other "open piled structures," which the act and authority specifically says "may be built."

As petitioners' property is entirely within the pierhead line, there is no "subordination" to public use, but specific permission for private use. Furthermore, the public does not use the property. It is occupied only by the defendants herein. The public use was extinguished by Ch. 182 of the Laws of 1837.

The facts also show this. On the maps in evidence are all sorts of "open piled structures" inside the pierhead line. There can not be public navigation under or over pier, sheds, ferry rack and other structures nor in these slips and basins where the defendant lessees herein moor their boats, floats and watercraft, and pay the City for the exclusive privilege.

The Court states that the ruling applies to "the City," but petitioners are the only sufferers from it herein. As to them, the authority of the Federal bulkhead line is construed to destroy the authority of the Federal pierhead line. As to the City, the Federal act and authority is interpreted to permit an unlawful retaking and to revive void and ineffective State legislation.

Two State Statutes are alleged (fols. 226-231) and held (fol. 1654) to have "prohibited" petitioners from filling in or erecting any structures whatsoever upon their property.

The first act, Ch. 763 of the Laws of 1837, in so far as it purported to effect petitioners or their property would be unconstitutional, but it was clearly superseded and repealed, as appears from brief annexed.

The second act, Ch. 574 of the Laws of 1871, specifically provided that it should not interfere with private property or rights theretofore conveyed by the City, as in the present case, until compensation was made. The Court of Appeals has so held in previous cases, cited in brief annexed.

The petitioners duly requested the Court to decide at the trial that if the said acts were construed against them that they violated certain provisions of the Constitution of the United States. The Court would have made this ruling, apparently, if it had not been confused as to the effect of the Federal bulkhead line, aforesaid.

The petitioners own a space of about 200 feet between each street and the City owns 60 feet in the bed of each street. The petitioners' title to the "intervening spaces" is dominant and the title of the City to the streets is servient and "in trust," by the contract in the deeds and by the settled law, yet the Court holds here, that the petitioners cannot build a pier or wharf on their property although the City can build sheds, etc., in the streets.

The effect of this ruling is that petitioners must give back their property without compensation, to the trustee who violates its contract.

The Court also erred as to the law upon this important subject as pronounced in its many previous decisions, and as stated by the Supreme Court of the United States. Petitioners' rights herein were acquired by contract and have come under the protection of the Constitution of the United States, and the State Court is without power to change its decision in such event.

For the reasons set forth in this petition and brief annexed, your petitioners submit that the decision of the Court of Appeals is contrary to law, and although a writ of error has been granted in this cause under Judicial Code, Section 237, petitioners being advised by counsel to present this petition out of greater caution, pray in the alternative, either (1) that a writ of certiorari may be issued out of and under the seal of this Court,

directed to the Clerk of the Supreme Court, New York County, commanding him to certify and send to this Court on a day certain to be designated in the writ, a full and complete transcript of the record and of all proceedings of said Court of Appeals of the State of New York in this action, to the end that the same may be reviewed and determined in this Court as provided in Section 237 of the Act of Congress known as the Judicial Code, and the said final decree of the said Court of Appeals in this action and every part thereof may be reversed by this Honorable Court and the action remanded with directions to grant the application prayed for in the petition, or (2) that consideration of this petition be deferred until the hearing on the said writ of error, and your petitioners pray for such other and further relief as may be just and equitable.

Dated, August 25, 1923.

EDGAR S. APPLEBY and
JOHN S. APPLEBY,
Individually and as Executors of the Last Will and Testament of Charles E. Appleby, deceased, Petitioners.

CHARLES HENRY BUTLER,
Counsel for Petitioners.

State of New York,
County of New York—ss.:

EDGAR S. APPLEBY being duly sworn, says: That he is one of the petitioners herein, united in interest and pleading together with said John S. Appleby, the other petitioner. That he has read the foregoing petition, and that the same is true and correct to the best of his knowledge, information and belief.

EDGAR S. APPLEBY.

Sworn to before me this
25th day of August, 1923.

AUGUST A. FINK,
Notary Public, Kings Co. No. 96.
New York Co. Clerk's No. 226.
Term expires March 30, 1924.

I, CHARLES HENRY BUTLER, attorney and counselor at law, duly admitted to practice in this Court, do hereby certify that I have examined the foregoing petition for Writ of Certiorari; that although a Writ of Error has been granted, the true scope and extent of the authority therefore is doubtful, rendering the petition for certiorari necessary for the proper protection of my clients' rights in the premises; that the petition is not made for delay, but is meritorious and well founded in law and ought therefore be granted.

Dated, August 25, 1923.

CHARLES HENRY BUTLER,
Counsel for Petitioners.

IN THE

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1923.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as Executors of the Last Will and Testament of Charles E. Appleby, deceased,
Petitioners,

—against—

THE CITY OF NEW YORK, *et als.*,
Respondents.

BRIEF IN SUPPORT OF WRIT.

Statement.

From its inception as a state and until the year 1837 the State of New York was the absolute owner in fee of certain premises hereinafter described, being an inshore part of the submerged lands along the Hudson River in said State, and had the power and right to fill in and improve same, or to grant its title and rights to individuals, for that purpose.

The shore line of the Hudson River was very irregular and it was deemed for the public interest to fill in the shallow tide water flats and have a straight ripa with exterior avenue as shown on map by Geo. B. Smith dated 1835 (Plaintiffs' Exhibit 1). This has been done all

around Manhattan Island, and many other cities and localities.

In 1837, by Chapter 182 of the New York Laws of 1837, the State (1) established said permanent ripa and exterior avenue along the Hudson River, (2) extended and established the City streets and avenues out to the ripa, (3) vested the City of New York with "all the right and title of the people of the State" to the lands then under water, and (4) provided that adjacent owners have the pre-emptive rights to grants from said City.

In 1852 and 1853, said City sold and conveyed to petitioners' predecessors in title, for $11,306.87 (fols. 1100, 1132) "certain water lot(s) or vacant ground and soil under water to be made land" by metes and bounds description along the established streets and avenues, together with the wharfage, etc., on the exterior avenue or ripa, "saving and reserving," the bed of the streets and avenues "*for uses and purposes of public streets, avenues and highways*" (fol. 1104), which "*shall forever thereafter continue to be and remain public streets and avenues and highways,*" etc. (fol. 1114) and also "excepting" the wharfage "in front of the entire width" of the streets *at* the westerly side of Thirteenth Avenue, or permanent ripa. (Italics ours.)

These deeds are printed at pages 367-388, and contain maps of the property conveyed.

In 1857, by Chapter 763 of the New York Laws of 1857, the State attempted to re-establish a bulkhead line 100 feet west of Twelfth Avenue, considerably inshore of the "permanent" line of 1837. This act was superseded and repealed as hereinafter shown.

In 1871, by Chapter 574 of the New York Laws of 1871 (amending Chapter 137, Laws 1870), the Dock Department of the said City was created, and authorized to adopt a plan for improving the submerged lands owned by the City, and to acquire all property not owned by the City, without interference with private property or rights.

In 1890, the Secretary of War, pursuant to *River and Harbor Act*, established a bulkhead line 150 feet west of 12th Avenue and parallel therewith, also a pierhead line 700 feet west of and parallel with the bulkhead line at the premises in question. The bulkhead line passes through petitioners' property and the pierhead line *far beyond it*.

In 1894 the City commenced a proceeding to acquire petitioners' property and rights (fols. 1189 *et seq.*). The Board of Estimate and Apportionment of the City adopted a resolution discontinuing said proceeding in 1914, one day after a motion was made by petitioners to go ahead with it.

At various dates during the pendency of the condemnation proceeding, which was delayed for lack of funds, the City erected piers in the streets and dug out petitioners' property for slips and basins, all according to the City plan of 1871.

Upon completion of the piers, slips and basins, the City rented same under permits and long leases for great revenue.

The facts are not disputed, showing a complete appropriation without compensation, contrary to statutes in such cases made and provided.

POINT I.

Erroneous interpretation of Federal and State acts and authority affecting a subject by great importance.

The case presents a Federal question. *U. S. v. Bellingham Bay Boom Company*, 176 U. S. 211, 218.

It has been shown in the petition herein that the ruling of the Court of Appeals is contrary to the Federal Act and authorities and for the sake of brevity will not be repeated here.

It can now be shown that upon such ruling the Court erred as to State legislation. The State never intended to resume any power or authority (which had been relinquished for value) over the premises in question, or to restore the public use, or to vest in the City the proprietary use of petitioners' property for slips and basins, without compensation.

The Court decided that

> "32. The Federal Statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and though the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to building of piers, wharves or docks within said space, the said Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the laws of 1857 provided that no piers should be erected within 100 feet of another

> pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue" (fols. 1654-1656).

This is error.

The Federal acts and authorities did not validate State legislation which was otherwise repealed, invalid, ineffectual, and unconstitutional as construed above.

The legislation of 1857 and 1871 was subsequent to Ch. 182 of the Laws of 1837. Also, it does not apply.

Ch. 763 of the Laws of 1857 in so far as it attempted to establish a bulkhead line, was concededly superseded by the act of 1871. Section 2 of the act which provided that no pier should be within 100 feet of another pier, was re-enacted as Section 731 in Ch. 410 of the Laws of 1882, an act to consolidate all the laws of the City. The provision was omitted from the Charter of the Greater City in 1897 and has never been re-enacted. The Charter now contained different provisions and Section 819 repeals all laws inconsistent therewith. Therefore, the Act of 1857 is repealed directly and by implication. The Court, in another part of the decision, holds it does not affect petitioners. Where two rulings

are inconsistent, the one most favorable to appellant controls, and here the favorable ruling is the correct one.

The Act of 1871 (Ch. 574) specifically provided that no authority exercised thereunder should interfere with private property (as in the present case) and contained definite directions as to purchase by City by treaty or condemnation. "Private rights were saved under that Act" (*Langdon v. Mayor, etc., C. N. Y.*, 93 N. Y. 129, 161 and many other cases).

By now holding that private rights were "prevented" (fol. 1655) or destroyed by the act of 1871, the Court rules contrary to the text of the statute and changes its own decision.

POINT II.

Decision, contrary to the settled law of the United States and, changing State law.

In addition to the change of ruling just noted as to the Act of 1871, the Court has also changed its decision in reference to the title and power of the State to convey submerged inshore lands, and particularly its specific decision of long standing as to title and rights conveyed by City deeds similar to those in the present case.

As to the title and power of the State, it has long been settled that upon separation from England the thirteen original States, of which New York was one, possessed all the rights and title of Crown and Parliament in submerged lands and navigable waters over them, to-wit: the *jus privatum* and the *jus publicum*.

In the Federal Constitution the States granted to Congress the power "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes" (Art. 1, Sec. 8, p. 3).

"The character of the State's ownership in the lands and in the waters is the full proprietary right. The State is the absolute owner of the lands and of the water over them" * * *. The State "is free to convey tide lands," subject to the constitutional restriction aforesaid. *Seattle* v. *Oregon & W. R. R. Co.*, 255 U. S. 56, at p. 63 and cases cited.

"The State may even dispose of the usufruct of such lands, as is frequently done * * * by the reclamation of submerged flats and the erection of wharves and piers and other adventitious aids of commerce", *Hardin* v. *Jordan*, 140 U. S. 371, 382, quoted with approval *Shively* v. *Bowlby*, 152 U. S. 1, 46.

Other words and phrases used to define the State's title and right to convey, are "plenary", "absolute fee", "fee simple absolute", "the whole title", "all the right and title", "the source of authority", "the *jus publicum* as well as the *jus privatum*", subject to the right of Congress to regulate commerce, as aforesaid. Cases above cited and *Montgomery* v. *Portland*, 190 U. S. 89, *St. Anthony Falls Water Power Co.* v. *St. Paul Commissioners*, 168 U. S. 349, *Langdon* v. *Mayor, etc.*, 93 N. Y. 129, 155, and numerous others.

Such title and right, unquestionably includes the power of the State by legislation to extinguish the *jus publicum* or, public use over a portion of the submerged lands between the shore and the channel, *Langdon* case, p. 160, *supra*; *Williams* v. *Mayor, etc.*, 105 N. Y. 419 (as in the present case), but does not justify unreason-

able grants of the whole waterway so as to destroy the public use entirely. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 453; *Matter of Long Sault Development Company*, 212 N. Y. 1, 242 U. S. 272; *Coxe* v. *State of New York*, 144 N. Y. 396.

The cases of reasonable grants are in complete harmony with those of unreasonable or void grants, as shown by the citation with approval of the *Langdon* case, *supra*, in the *Coxe* case, *supra*, at p. 407, and in *Long Sault* case, *supra*, at p. 8. The Court overlooks this, as is shown by its citations and reference to destroying "the navigability of the Hudson."

This case does not involve any unreasonable grant, but on the contrary a question as to who is entitled to the use and benefit of a reasonable one, the parties who paid for it, or the corporation that sold it.

The important point is, that the deeds in the present case are *City* deeds, which have been continuously construed by the State's highest court as reasonable grants for the benefit of the people, and as conveying an "absolute" title subject only to Federal power. The following resume of decisions will show this clearly and that the Court was confused by rulings as to "limited grants," "licenses," "permits," "privileges," "riparian rights," etc. It was error to confuse those cases with absolute deeds by City of "all the right and title of the people of the State." There is no uncertainty or doubt as to the previous decisions of the Court as to City deeds. It is inconceivable that the "public use" should continue over the "intervening spaces" inside the "permanent ripa."

A. The City deeds, all similar, vested in the grantees an "absolute fee" with "immediate possession" and right "to fill in or improve at their

pleasure," subject only to Federal regulation. This has been held in many cases, the leading authorities being *Langdon* v. *Mayor, etc.*, 93 N. Y. 129, 149, 159; *Duryea* v. *Mayor, etc.*, 62 N. Y. 592, 597; *same case*, 96 N. Y. 477, 488, 497; *Williams* v. *Mayor, etc.*, 105 N. Y. 419, 432; *Mayor, etc.* v. *Law*, 125 N. Y. 380, 391; *Furman* v. *Mayor, etc.*, 10 N. Y. 567, 568.

The point seems to have been well settled and reiterated from 1829 up to the present decision.

Judging from the citations by the Court, its confusion seems to have arisen as to a "trust", which the State has, in the public channel of navigable waters, *Long Sault Dev. Co.* case, *supra*, and which the City of New York has in and to its streets, *Knickerbocker Ice Co.* v. *Forty-second St. R. R. Co.*, 176 N. Y. 408, 418; *Matter of Mayor, etc.*, 193 N. Y. 503, and *American Ice Co.* v. *City of N. Y.*, 217 N. Y. 402. With this distinction, the above cases are in harmony with the *Langdon* case, *supra*.

Cases cited by the Court and involving different legislation, and riparian rights should be noted.

People v. *Vanderbilt*, 26 N. Y. 287, was different legislation for a specified purpose only. No power in City to grant to individual. Purpose abandoned. Grant void. Sustains A.

People v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, 79-80, was a limited grant, "privilege" or license of *jus privatum*. Discusses *jus publicum* and sustains A. The Court herein failed to notice this, as clearly shown by its opinion.

Coxe v. *State*, 144 N. Y. at pp. 405, 406, was a concededly unreasonable and extravagant grant (404) of vast domain (405) by void legislation against public interest. Distinguishes grants

"around Manhattan Island" and approves *Langdon* case (407).

Sage v. *Mayor*, 154 N. Y. 61, 73 and *Matter of City of N. Y. (Speedway)*, 168 N. Y. 134, were merely riparian right cases, which distinguish and approve *Langdon* case.

Lewis v. *Blue Point Oyster Co.*, 198 N. Y. 293, was a mere right to plant oysters under *jus privatum* grant impaired by Federal Government dredging channel. Cites, distinguishes and approves *Langdon* case (293, 296).

Montgomery v. *Portland*, 190 U. S. 89, illustrates the point we have made as to the erroneous interpretation in the present case of the Federal Act and Authority. In citing the *Montgomery* case, the Court overlooks the distinction, to wit, that Montgomery was a riparian owner *without* a grant and that petitioners are absolute owners with a *grant*. Such legislation as Ch. 182 of the Laws of 1837 and the City deeds are absent in the *Montgomery* case.

Town of Brookhaven v. *Smith*, 188 N. Y. 74 and *Barnes* v. *Midland R. R. Terminal Co.*, 193 N. Y. 378, are riparian right cases, entirely different from present case. It might be noted, however, that in said cases, the Court held that the "littoral owner" *without* a grant could maintain a pier, although the Court holds in the present case, that the littoral owner *with* the highest type of grant known to law, can *not* do so.

First Construction Co. v. *State of N. Y.*, 221 N. Y. 295, involved grant without consideration of a mere privilege or license (p. 316), which conveyed no title.

Tiffany v. *Town of Oyster Bay*, 234 N. Y. 15, involved riparian rights and is not in point.

Matter of Public Service Commission, 224 N. Y. 211, was a commerce grant made 30 years after 1855 legislation, and therefore taken subject thereto.

There is not a single authority which has been or can be cited by the Court to justify its change of State law, upon which the petitioners and their predecessors in title relied, as well as upon the legislation and the contract in the deeds, in paying large sums therefor, in complying with the covenants therein and in paying $74,426.01 taxes upon the premises in question. The Court is without power to change its ruling so as to take away petitioners' rights acquired by contract which have come under the protection of the Constitution of the United States. *Muhlker* v. *N. Y. & Harlem R. R. Co.*, 197 N. Y. 544, 570.

POINT III.

Impairment of obligation of contract and taking without compensation.

The Court of Appeals has denied petitioners protection of their property and rights, although flagrant violations of the contract in the deeds are admitted.

1. The contract in the deed is to fill in or improve with wharves, the granted premises, for the grantees' use,—not to dig out same for City's use. The deeds were made when the Federal power lay dormant, but the Federal authorities by the adoption of bulkhead and pierhead lines,

specifically approved the filling in of a part and the erection of "open piled structures" on the remainder of petitioners' property.

2. The City conveyed and covenanted the wharfage on the westerly side of 13th Avenue, but has erected a pier and basin inshore thereof, and even inshore the Federal bulkhead line, over all of petitioners' property, and takes all the wharfage and rents therefrom. The *only* wharfage which the City excepted or retained in the deeds, was at the *end* of the streets, to wit, the westerly side of Thirteenth Avenue.

3. The entering wedge of the City's wrong was the construction of "pier approaches" in the streets. Having done this under the cloak of a condemnation proceeding and continued the wrong for some years, it then shedded or enclosed the piers and excavated petitioners' property for slips and basins. All of which was contrary to covenants and agreements of the parties that (a) grantees have the prior right to build the streets, which were to remain "public highways forever." Even the possible easements in the streets are destroyed by sheds and other structures in the streets. *Story* v. *N. Y. El. Ry.*, 90 N. Y. 122, involving similar deed from City.

Every bit of petitioners' property and rights between 12th and 13th Avenues conveyed and covenanted by City by authority of the people, in Legislature (Ch. 182 of Laws 1837), and City deeds, have been appropriated or violated, without compensation. This cannot be excused by Federal Acts. Petitioners duly alleged at the trial, the violation of their constitutional rights (fols. 438-450).

It must be apparent that a grantor cannot take back property without compensation and collect great revenue therefrom, and at the same time levy taxation on the property and collect it from the grantees. This fact itself, shows the injustice of the decision and the necessity of protection.

Relief to petitioners will afford justice and not harm the City, as it gets a dollar returned on every dollar expended. *Langdon* case, *supra*.

From what has been said it appears that the subject matter is not only of vital importance to petitioners but is of broad public interest, and affects vast property rights nationally, as well as locally.

CONCLUSION.

WHEREFORE, the petitioners pray in the alternative:

1. That a writ of *certiorari* issue forthwith: or

2. That, since a writ error has been allowed herein under Judicial Code, Section 237, the consideration of this petition be deferred until the hearing on the writ of error.

Dated, New York, August 25, 1923.

Respectfully submitted,

BANTON MOORE,
Attorney for Petitioners.

CHARLES HENRY BUTLER,
Counsel for Petitioners.

APPENDIX.

Opinion of the Court of Appeals per Mr. Justice Pound.

EDGAR S. APPLEBY, *et al.*, individually and as Executors of Charles E. Appleby, deceased, Appellants and Respondents, v. THE CITY OF NEW YORK, *et al.*, Respondents and Appellants.

CROSS-APPEALS from judgment of the Appellate Division, First Department, modifying and as modified, affirming a judgment of Special Term in favor of plaintiffs.

SPOTSWOOD D. BOWERS and BANTON MOORE, for Plaintiffs, Appellants and Respondents.

JOHN P. O'BRIEN, Corporation Counsel (Charles H. Nehrbas, of Counsel), for Defendant, Respondent and Appellant, the City of New York.

STETSON, JENNINGS & RUSSELL, for Weehawken Stock Yard Company, Intervener.

POUND, *J.*:

This is an action to restrain the City of New York and other defendants from interfering in any way with the use and enjoyment of plaintiffs' lands under the water of the Hudson River between Thirty-ninth and Fortieth Streets and between Fortieth and Forty-second Streets, outshore of Twelfth Avenue in the Borough of Manhattan.

Title to the premises was vested in the City of New York by grants under the Colonial Charter

of Governor Dongan in 1686. By Chapter 115, Laws of 1807, the commissioners of the land office were directed to issue letters patent to the City granting to it all the right and title of the state to the lands under water at the locality, extending from low-water mark, four hundred feet into the river. By Chapter 182, Laws of 1837, Thirteenth Avenue as laid out on the George B. Smith map, so-called, was declared to be the permanent exterior street or avenue in the city along the easterly shore of the Hudson River between the southerly line of Hammond Street and the northerly line of One Hundred and Thirty-fifth Street. The City of New York was vested with all the right and title of the people of the state to the lands under water extending from the westerly line of the lands granted by the Act of 1826 to the westerly line of Thirteenth Avenue, so laid out. The street lines were laid out over the lands under water thus conveyed. Chapter 225, Laws of 1845, authorized the adoption of the ordinance known as the sinking fund ordinance which empowered the City to make the grants hereinafter mentioned.

On or about December 24, 1852, the City issued to one Latou a grant of a portion of the lands in suit, describing the same as a "water lot or vacant ground and soil under water to be made land and gained out of the Hudson." Another like grant was issued to the predecessor of plaintiffs on or about August 1, 1853, of the remaining portion of the lands. Plaintiffs claim title under these grants. The westerly line is the westerly line of Thirteenth Avenue. The easterly line is the line of original high-water mark, which runs between Eleventh and Twelfth Avenues. The

grants were made for a substantial consideration. The streets were reserved to the City out of the granted premises and the grantees agreed to build streets and wharves when directed by the City. No such direction has been given.

By Chapter 121, Laws of 1855, a commission was appointed to prepare plans for the improvement of New York Harbor. By Chapter 763, Laws of 1857, bulkhead and pier lines were established for the port of New York. A bulkhead line or line beyond which solid filling should not extend was established about 100 feet west of the westerly line of Twelfth Avenue. This line was some distance east of Thirteenth Avenue as laid out on the map. Under Chapter 574, Laws of 1871, a further plan for the improvement of the water front moved the bulkhead line fifty feet farther out into the river and laid out piers eighty feet in width at the foot of Thirty-ninth, Fortieth and Forty-first Streets.

In 1890 the latter line was established as a bulkhead line by the Secretary of War under authority vested in him by Congress. Piers have been laid out under an authorized plan and built by the City within the street lines of Thirty-ninth, Fortieth and Forty-first Streets, which extend into the river beyond the bulkhead line. Permits and leases to occupy and use the piers have been granted by the City to the other defendants herein who float vessels in the slips over the plaintiffs' lands. The City of New York claims the right to dredge such lands for the purposes of harbor improvement. They rest such right on the contention that the lands under water are navigable and cannot lawfully be obstructed by plaintiffs. The plaintiffs contend

that the land under water between the bulkhead line and their westerly line was granted in fee simple absolute and for beneficial enjoyment; that no public right or navigation remained over the lands thus conveyed.

The question is to what extent has the state by its grants extinguished the *jus publicum* over such lands.

At Special Term the City of New York was enjoined from dredging the lands of plaintiffs. The Appellate Division modified this judgment by permitting the City to dredge the lands *west of the bulkhead line* established by the Secretary of War.

The City appeals because it claims the right to dredge any portion of plaintiffs' lands between the piers. The plaintiffs appeal on the ground that they are entitled to the relief demanded in the complaint.

The state holds the title in fee to lands under water as sovereign for the public, subject to the right of the people to use the river as a water highway. The grant of the lands to the City in 1807 was for the purpose of enabling the City to regulate and construct slips, wharves and piers. The City sold the lands for the purpose of enabling the grantees to fill and use the land for the extension of streets thereon and the erection of wharves, piers, etc.

The grant was, therefore, not absolute and unqualified, but was subject to the rights of the public. (*American Ice Co.* v. *City of New York*, 217 N. Y. 402, 405, 406.) The City could not exclude the public from the use of navigable waters and it could not grant the right to exclude the public from such use so long as the waters

remained navigable. It scarcely needs assertion that it could not destroy the navigability of the Hudson by making exclusive private grants. It could convey submerged lands along the shore to promote commerce, not to destroy it.

When the Secretary of War established the bulkhead line, the title of the State, the City and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it. (*Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82.) Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The City of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs.

But the United States acts as sovereign and the State of New York acts also as proprietor. The authority of the State in its governmental capacity over the waters of the Hudson within its limits is plenary, subject only to such action as Congress may take. (*Montgomery* v. *Portland*, 190 U. S. 89; *Matter of Public Service Commission*, 224 N. Y. 211.) It might have improved the water front itself. It had, however, granted all its title to the premises to the City of New York. The City might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips.

If plaintiffs' lands easterly of the bulkhead line had been actually filled in they would no longer be lands under water and would be free from the regulatory power of the State (*First Construction Co.* v. *State*, 221 N. Y. 295), but so long as they remained under water they were subject to the sovereign power of the State to regulate their use for purposes of navigation. The state has delegated such powers to the City. The City may not, however, as the successor to the title of the State, convey lands under waters to private owners and retake the same by the exercise of the police power without making compensation therefor. (*Penn. Coal Co.* v. *Mahon*, 260 U. S. 393; 43 Supp. Ct. Rep. 158.) A distinction is taken between the mere ownership of the soil under water and the control of it for public purposes (*People* v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71).

Great cities have been built up by grants of land under water. The City of New York has been similarly developed by extending it over submerged lands. The promotion of the commercial prosperity of the port has been one purpose of such grants. But no case holds that any substantial interference with navigation may thus be authorized. Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is dictum (*People* v. *Steeplechase Park Co.*, 218 N. Y. 459; *Langdon* v. *Mayor*, 93 N. Y. 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of

lands under navigable waters, together with the exclusive privelege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for private purposes. (*Town of Brookhaven* v. *Smith*, 188 N. Y. 74; *Barnes* v. *Midland R. R. Terminal Co.*, 193 N. Y. 378). The lands in question remain under the public waters of the State and so long as they remain such, the right to control navigation over them remains in the State to be exercised in the public interest. (*Matter of Long Sault Development Co.*, 212 N. Y. 1; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 453.) The State has succeeded to the *jus publicum* of the English crown and not to the *jus privatum* (*Town of Brookhaven* v. *Smith*, *supra*), notwithstanding much unnecessary discussion of the latter doctrine. The *jus privatum* in any event is at all times subject to the *jus publicum*. (*Tiffany* v. *Town of Oyster Bay*, 234 N. Y. 15.) The right of the grantee to fill in his land under water with solid filling (*Duryea* v. *Mayor*, 62 N. Y. 592, 597; 96 N. Y. 477, 496) is a delegated exercise of the public right in aid of commerce and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. But such grant having once been made, titles traced back to the State as proprietor may not be divested by such regulations, without compensation.

The grant to plaintiffs being a property right which can be resumed by the City only on payment of compensation, was a grant of all the title the City had to convey. The right of the public was not thereby extinguished. The City had the right to dredge out all the lands under water between the piers to promote navigation. The establishment of the bulkhead line does not conflict with the right of the City in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without reacquiring the title which it has authorized the City to convey to private owners.

The judgment should be affirmed, without costs.

HISCOCK, *Ch. J.*, HOGAN, CARDOZO, MCLAUGHLIN, CRANE and ANDREWS, *JJ.*, concur.

Judgment affirmed, etc.

IN THE

Supreme Court of the United States,

October Term, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors, etc.,
Plaintiffs in Error,

—against—

THE CITY OF NEW YORK, *et al.*,
Defendants in Error.

No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs in Error,

—against—

JOHN T. DELANEY, as Commissioner of Docks of the City of New York,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES E. HUGHES,
BANTON MOORE,
Of Counsel.

THE COURT PRESS—47 West Street—Bowling Green 2820 Law Printers

GENERAL INDEX.

LIST OF CASES CITED:

NEW YORK LAWS:

IN THE

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EDGAR S. APPLEBY and JOHN S. APPLEBY, *Plaintiffs in Error,* —against— JOHN T. DELANEY, as Commissioner of Docks of the City of New York, *Defendant in Error.*	No. 16

In Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFFS IN ERROR.

With the permission of the Court we shall argue these two cases together and discuss the points they present in this brief.

The two cases involve the same fundamental ques-

tions. They relate to the same property and arise under the same grants. The differences are procedural rather than substantial, and it will avoid repetition to discuss the questions applicable to both cases in a single brief.

Statement.

These are writs of error to review judgments of the Supreme Court of the State of New York, which have been affirmed by the Court of Appeals of the State, records remaining in the Supreme Court (*Appleby* v. *City of New York*, 199 App. Div. 539; 235 N. Y. 351; *The Matter of Appleby* v. *Delaney*, 199 App. Div. 552, 235 N. Y. 364). There are also petitions for writs of *certiorari*, which are held pending the hearing upon the writs of error.

The plaintiffs in error (plaintiffs below) are grantees of the City of New York. The property granted consists of water lots on the west side of the City of New York to be made land or gained out of the Hudson or North River between 39th and 41st Streets and Twelfth and Thirteenth Avenues. There are two grants—one made on August 1, 1853, to the plaintiffs' ancestor and testator, Charles E. Appleby, of the land under water between 39th and 40th Streets and the other made on December 24, 1852, of the land under water between 40th and 41st Streets. The premises covered by the two grants embraced the land under water from the original line of high water between Eleventh and Twelfth Avenues to the westerly side of Thirteenth Avenue. The portions within the streets and avenues, that is within 39th, 40th and 41st Streets and Twelfth and Thirteenth Avenues excepted for public streets.

No. 15

In No. 15, *Appleby* v. *The City of New York*, the suit was brought in 1914 to restrain the defendant, The City of New York and its co-defendants, the City's lessees, from violating the rights of property claimed under these grants (*Record*, No. 15, Amended Complaint, pp. 9-60). The point of this suit was that while the City had granted absolute title in fee simple to the land in question with right to fill in and improve the same and to enjoy the easements appurtenant thereto, and also with the wharfage, cranage, advantages and emoluments accruing by or from that portion of the exterior line of the City lying on the westerly side of the granted premises fronting on the Hudson River, the City had undertaken without condemning plaintiffs' property and easements and paying just compensation therefor to appropriate them to its own use, by restricting plaintiffs' enjoyment, by building piers and structures which it leased to its lessees with the privilege of floating, mooring and docking boats over the plaintiffs' premises, using the plaintiffs' premises as slips or basins for itself and its lessees, and by otherwise violating the plaintiffs' rights.

The plaintiffs raised Federal questions under the contract clause (Article I, Section 10) and the due process clause (Fourteenth Amendment) of the Federal Constitution, insisting that the legislation invoked by the City if effect were given to it as against plaintiffs' rights of property violated these constitutional provisions (*Record*, No. 15, pp. 149-150).

The legislative situation was in brief as follows:

After the grants in question, the State, by Laws of 1857, Chapter 763, undertook to fix the bulkhead line or line

of solid filling, in this vicinity, at 100 feet westerly of the westerly side of Twelfth Avenue by the confirmation of the Harbor Commissioners' map so showing it. By the same Act it was provided that no pier should be erected within 100 feet of another pier. By Laws of 1871, Chapter 574, the Department of Docks of the City of New York was created and the Board of Commissioners of Docks was directed to cause a plan for the development of the waterfront of the City to be prepared. Special authorization was given for the purchase or condemnation of property which might be taken in pursuance of the plan. The Commissioners adopted a plan for a new bulkhead line 50 feet west of the bulkhead line of 1857, that is, 150 feet westerly of the westerly side of Twelfth Avenue, and a pierhead line 500 feet westerly of the bulkhead line, and indicated on the plan where and how piers might be built. That plan was accepted by the Commissioners of the Sinking Fund.

In 1890, the Secretary of War approved the bulkhead and pierhead lines (of 1871) as recommended by the New York Harbor Line Board, and in 1897 he modified and re-established the pierhead line 700 feet westerly of the bulkhead line, upon similar recommendation of the New York Harbor Line Board. The Secretary of War did not adopt the pier plan of the City, but his map states (see original of Deft's. Ex. C, p. 529) that open pile structures could be built within the Secretary of War's pierhead line. There was thus a considerable portion of the plaintiffs' premises which they were entitled to fill in up to the bulkhead line of 1871, coincident with the Secretary of War's bulkhead line. And the Secretary of War's pierhead line was far outside beyond the limit of the plaintiffs' grant, that is be-

yond the originally projected Thirteenth Avenue. The State act of 1857 (above mentioned), however, provided that no pier should be erected within 100 feet of another pier and under the plan adopted in 1871 the City having erected piers in 39th, 40th and 41st Streets, and having leased exclusive pier privileges to their lessees, the plaintiffs were prevented from erecting any pier, wharf, or other structure upon their premises between the bulkhead line established by the Secretary of War and Thirteenth Avenue as originally laid down and described in the grants. It follows that this legislation, if effect be given to it, operates to deprive the plaintiffs of all rights under their grants beyond the bulkhead line.

After the trial of this suit (No. 15), but before the decision, the Commissioner of Docks proposed a plan amending the plan for waterfront improvements in the *locus in quo* by moving the bulkhead line inshore 100 feet, which placed it 50 feet west of the westerly line of Twelfth Avenue. This made a new bulkhead line 100 feet inside of the line of 1871 and the Secretary of War's line of 1890. This amendatory plan was approved by the Sinking Fund Commissioners in June, 1916, and under the applicable act of the State this action of the Commissioner of Docks and the Sinking Fund Commissioners constituted legislative action establishing a new rule for the limit of bulkhead and solid filling (Greater New York Charter, Secs. 817 *et seq.*). It is obvious that if effect were given to this legislation the plaintiffs' grants would be further impaired to the extent of a strip 100 feet wide across their entire premises. The construction of the Federal statutes under which the Secretary of War had fixed bulkhead and pierhead lines and the scope of his authority and effect of his action in so doing were also brought into question (*id.*, pp. 149-150).

The Decision in this suit (No. 15) set forth findings of facts and conclusions of law (*id.*, pp. 171-199) on which judgment was entered in July, 1917 (*id.*, pp. 201-203). The judgment gave an injunction against the City and those claiming under it restraining and compelling certain acts, but was not as broad as the plaintiffs had demanded. Cross appeals were then taken to the Appellate Division of the Supreme Court where order and judgment was entered on January 20, 1922. This affirmed the findings of facts of the trial Court, but modified certain conclusions of law and the injunction which had been granted, and as thus modified affirmed the judgment below (*id.*, pp. 549-591). On this order and judgment of the Appellate Division judgment of modification was entered on March 22, 1922 (*id.*, pp. 551-552). Appeal was then taken to the Court of Appeals where the judgment of the Appellate Division was affirmed and on *remittitur* this judgment was made the judgment of the Supreme Court (*id.*, pp. *a*, *b*, *c*).

The judgment in review is thus the judgment of the Appellate Division adopted by the Court of Appeals. This judgment maintains the plaintiffs' title; it explicitly determines that the legislature of the State had extinguished the *jus publicum* in the lands granted and that such grants are irrevocable and inviolate; that the plaintiffs had the right to fill in and make dry land at their pleasure and without the consent of the City of New York of so much of said premises as lay between the westerly side of Twelfth Avenue and the bulkhead line established by the Secretary of War in 1890. It was also held that the grants in question had been made for a valuable consideration and were valid contracts which could not be impaired by subsequent legis-

lation of the State without compensation. But the Court then proceeded to sustain such subsequent legislation with respect to the granted premises beyond in impairment of the grants (*id.*, pp. 550-551). The Court modified the injunction granted by the trial Court so far as it enjoined the excavation, dredging or removing of the soil of plaintiffs' premises westerly of the said bulkhead line (*id.*, p. 549) and also held that the plaintiffs were not entitled to an injunction restraining the City from using or authorizing the use by others of the plaintiffs' premises either within or without said bulkhead line for the purpose of mooring, docking and floating boats (*id.*, p. 551).

No. 16

As it was held in the suit above described (No. 15) following earlier decisions of the State court that under the grants in question the plaintiffs had the right to fill in and improve their premises out to the bulkhead line, the plaintiffs in December, 1919, made an application to the Commissioner of Docks for permission to fill in and improve the premises in the manner described in plans submitted. The reason for this application was that the plaintiffs had been compelled to pay approximately $74,000 taxes and desired to improve their property (*Record*, No. 15, Stipulation, p. 200). While they had a clear right to fill in up to the bulkhead line, the City, of course, had the power of reasonable police supervision as they have with respect to all property within its limits, and it was necessary to obtain the usual permits under which the work which the petitioners were entitled to do might proceed in consonance with appropriate municipal regulations (*Record*, No. 16, pp. 24-34). The

Commissioner of Docks denied the application, but not upon the ground that the plans were defective in any particulars to which the supervisory power of the City might be properly directed, but solely upon the ground that the proposed construction was not in accordance with the "new plan" of 1916 (*id.*, p. 35). This new plan was the plan which the Commissioner of Docks had proposed and the Sinking Fund Commissioners had approved for moving the bulkhead line in 100 feet of the line of 1871 and the Secretary of War's line of 1890. The plaintiffs then presented to the Supreme Court their application for a peremptory writ of *mandamus* to compel the Commissioner of Docks to grant the permit (*id.*, p. 34). The petitioners showed that if effect was given to this new plan it would impair the obligation of the contracts contained in their grants and deprive them of their property in violation of their rights under the applicable provisions of the Federal Constitution (*id.*, pp. 10-11). The City answered the petition, according to the practice in the State court, by the affidavit of the Commissioner of Docks in opposition to the petition. His opposition was solely upon the ground that the application of the petitioners called for the construction of substantial structure and solid filling outside of the bulkhead line of the "new plan" which had been adopted in 1916, and therefore he was "without power to grant the application" (*id.*, p. 65). The Supreme Court at Special Term thereupon denied the application, the denial being stated in the order of the Court to be "as a matter of right and not in exercise of discretion." The opinion of the Court said that the grants by the City had been made upon condition that permission should be obtained from the City before structures could be erected.

and as they did not have permission they could not erect (*id.*, p. 66).

Appeal was then taken to the Appellate Division of the Supreme Court which held that view to be erroneous and reversed the order and granted the *mandamus*, but it was provided that the writ should not issue for thirty days in order to allow appropriate condemnation proceedings to be instituted to acquire the property and property rights of the relator (*id.*, p. 74). The Court held that the bulkhead line as established in 1916, which crossed the premises granted by the original grants, did not limit the rights of the plaintiffs and that these were restricted only by the bulkhead line approved by the Secretary of War. The Court ruled that the plaintiffs had an absolute right to fill in up to the bulkhead line. The Court pointed out that no objection had been made by the Commissioner of Docks to the alternative plan presented for the improvement, and that he should issue a permit based upon one of the other proposed plans, and that if he should deem it necessary that the bulkhead and wharves should be built on the bulkhead line established in 1916 the City should be afforded an opportunity to acquire the property on paying for it (*id.*, p. 74). The order of the Appellate Division was entered accordingly on April 27, 1922 (*id.*, pp. 69-70).

Appeal was then taken to the Court of Appeals where this order was reversed and the order of the Special Term affirmed (*id.*, pp. *a*, *b*, *c*). The Federal questions were duly urged throughout the proceedings.

This decision of the Court of Appeals undoubtedly gave effect to the pier plan of 1871 and the new bulkhead plan of 1916. This was legislative action attempting to establish a rule as to bulkheads and fillings under

authority of the legislature. The new plan was manifestly in derogation of plaintiffs' rights of property and impaired the obligations of their contracts. This new plan as has been said was the only ground stated in the answer in the Commissioner of Docks' affidavit.

The Court of Appeals in its opinion referred to a section of the Sinking Fund ordinance of 1844 which provided that no grant made by virtue of the ordinance should authorize the grantee to construct bulkheads or piers or make land in conformity therewith without the permission of the common council, but the Court of Appeals had held (in No. 15) and the law of the case between these plaintiffs and the City was thereby established, that the plaintiffs had the absolute right to fill in up to the bulkhead line of 1890 as laid down by the Secretary of War, and that this could be done by them "at their pleasure and without the consent of the City of New York" (*Record*, No. 15, p. 550). This was in the order and judgment which the Court of Appeals affirmed in that case. If the ordinance of 1844 could be deemed to have any effect, in the light of the rights of the plaintiffs under their grants as finally established, it could only refer to the reasonable police supervision of the City and the permission which should be obtained for that purpose and which in a proper case the City was bound to give; certainly not to a permission which it could withhold in the interest of a plan destructive of the plaintiffs' rights of property.

The Court of Appeals also in its opinion referred to a covenant in the grants that the grantees would not build the wharves, bulkheads, avenues or streets mentioned in the grants or make the lands in conformity with the covenants in the grants until permission should

be had from the City, and would not build any wharf, pier or other obstruction without the permission of the City. Grants of this sort and with this provision had frequently come before the courts for construction. These grants contained covenants of the grantees to make the lands within the limits of the streets and avenues at the request of the City. The Court of Appeals had held that the covenant not to build or make land etc. above quoted, only applied to the land within the limits of the streets and avenues and not to the lands granted to the grantees (*Duryea* v. *Mayor*, 62 N. Y. 592, 596, 597; *Duryea* v. *Mayor*, 96 N. Y. 477, 496; *Mayor* v. *Law*, 125 N. Y. 380, 391). This was the construction specifically placed upon the grants by the judgment in No. 15. For in the decision in that case it was expressly found as a conclusion of law that the covenant by the grantee that it would not build the wharves, bulkheads, avenues or streets or make the lands in conformity with the covenants mentioned until permission should be obtained from the City "relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues" (*Record*, No. 15, par. (14), p. 197). It was also there held expressly that the covenant by the grantee that he would not build or erect or cause to be built or erected any wharf, pier or any other obstruction in the Hudson River in front of the granted premises without the permission of the City refers only to the land under water "in front of the plaintiffs' premises" and that there was no such covenant as to the granted premises between the streets and avenues (*id.*, par. (15), pp. 197, 198). These conclusions of law were expressly affirmed in the order and judgment of the Appellate Division in No. 15 (*id.*, p. 551),

and this judgment was affirmed without modification by the Court of Appeals (*id., b*). In the case therefore in which the rights of the plaintiffs under their grants were put in issue and decided it was finally and expressly adjudged that the covenant mentioned by the Court of Appeals requiring permission of the City did not apply to the premises granted to the plaintiff.

The decision of the Court of Appeals in No. 16 reversing the order of the Appellate Division and affirming the order of the Special Term denying the petition for *mandamus* simply gives effect to the "new plan" set up under the Act of 1916 which has been held in No. 15 should not be given effect because of the right of the plaintiffs to fill in out to the Secretary of War's line.

The result of the two cases is that the plaintiffs' contract rights and property rights protected by the Federal Constitution have not been recognized by the judgment in No. 15 to the extent to which the plaintiffs are entitled, and by the judgment in No. 16, under which the City in the interests of its "new plan" can arbitrarily refuse permission to the plaintiffs to exercise their rights under their grants, plaintiffs' contract rights and property rights are wholly destroyed. They own property and have paid large taxes upon property which they cannot use in any way.

FACTS.

Having made this preliminary survey, we proceed to a more detailed statement of the facts.

The Hudson River bounds the westerly shore of Manhattan Island in New York City. Its shore lines were originally irregular, with mud flats and indentations be-

tween the upland and the deep water channel or navigable portion of the stream. As usual, where large cities border on tidal waters, it became essential for the public benefit to establish a permanent and regular *ripa* where access could be had from upland to river, by defining the channel, and providing for the erection of a bulkhead and the filling in of the waste lands not needed for navigation.

This was done by the legislature of New York in Chapter 182 of the Laws of 1837. This act established the permanent *ripa* and exterior avenue (Thirteenth Avenue) along the Hudson River as shown on the map of George P. Smith (*Record*, No. 15, Plaintiffs' Ex. 1, p. 365). The Act extended and established the City streets and avenues out to the *ripa*. It vested the City of New York with "all the right and title of the people of this State" to the lands then under water. And it provided that adjacent owners should have the pre-emptive right to grants from the City. In view of the importance of this act, it is quoted in full as follows:

> "§1. The Thirteenth Avenue, as laid out on a map made by George B. Smith, city surveyor, bearing date March tenth, eighteen hundred and thirty-seven, and approved by the mayor, aldermen and commonalty of the city of New-York, by a resolution passed in common council, on the twenty-eighth day of March, eighteen hundred and thirty-seven (which map is filed in the office of the street commissioner of the city of New-York), shall be the permanent exterior street or avenue in the said city along the easterly shore of the North or Hudson's river, between the southerly line of Hammond-street, and the northerly line of One hundred and Thirty-fifth-street.

§2. The several streets of the said city as laid out on the map or plan made by the commissioners appointed by the act entitled 'An act relative to improvements touching the laying out of streets and roads in the city of New-York, and for other purposes,' passed April 3d, 1807, or as subsequently established by law, southerly of and including One hundred and Thirty-fifth-street, shall be continued and extended westerly along the present lines thereof, from their present terminations, on the said map or plan, respectively, to the said Thirteenth Avenue. Also, the Eleventh Avenue shall be continued and extended, on the said map or plan, along the present line thereof from its present southerly termination, at or near Thirty-third-street, to Nineteenth-street; and the Twelfth Avenue shall be continued and extended on the said map or plan, along the present line thereof, from Thirty-sixth-street to One hundred and Thirty-fifth-street.

§3. The mayor, aldermen and commonalty of the city of New-York shall be, and they are hereby, vested with all the right and title of the people of this state, to the lands covered with water along the easterly shore of the North or Hudson's river, between Hammond-street and One hundred and Thirty-fifth-street, and extending from the westerly side of the lands under water, heretofore granted to the said mayor, aldermen and commonalty of the city of New-York, by letters patent, in pursuance of the act entitled 'An act relative to improvements in the city of New-York,' passed February 25th, 1826, to the westerly side of the said Thirteenth Avenue. And the said letters patent shall be construed so as to grant to the

said mayor, aldermen and commonalty of the city of New-York, and their successors forever, the said lands under water easterly of the westerly line of the said Thirteenth Avenue.

§4. The proprietors of all grants of land under water, or of water lots, heretofore made by the said mayor, aldermen and commonalty of the city of New-York, on the easterly shore of the North or Hudson's river, shall have the pre-emptive right in all grants to be made by the said mayor, aldermen and commonalty of the city of New-York, of any lands under water, granted to them by this act, adjacent to and in front of the said lands under water so heretofore granted; and the proprietors of land having a pre-emptive right to grants of land under water, by virtue of the said act entitled 'An act relative to improvements in the city of New-York,' passed February 25th, 1826, shall have the same pre-emptive right in all grants made by the said mayor, aldermen and commonalty of the city of New-York, of any lands under water granted to them by this act."

The grants to the plaintiffs' predecessors in title (Charles E. Appleby and Robert Latou) were made on August 1, 1853, and December 24, 1852, respectively (*id.*, Plaintiffs' Exs. 4, 5, pp. 367-387). The grants were made upon valuable and substantial considerations ($11,306.87). The premises granted are shown in pink on the maps which form part of the grants (*id.*, pp. 369, 379). The Appleby grant (Ex. 4) ran from the center line of Thirty-ninth Street to the center line of Fortieth Street and from the original line of high water out to the exterior line or westerly side of Thirteenth Avenue.

The Laton grant ran from the center of Fortieth Street to the center of Forty-first Street and from the original line of high water out to the said exterior line. In each grant the portions of the premises lying within Thirty-ninth and Fortieth Streets and Twelfth and Thirteenth Avenues were excepted for public streets. The grant was in each case of

> "All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York, and bounded," etc.
>
> * * * * * * *
>
> "Together with all and singular the privileges, advantages, hereditaments and appurtanances to the same belonging or in any wise appertaining."

The grants were in fee simple. The grantees respectively covenanted that they would, upon the request of the City, build bulkheads, wharves, streets and avenues to form part of Twelfth and Thirteenth Avenues and Thirty-ninth, Fortieth and Forty-first Streets as excepted, and that they would keep these in repair. No request has ever been made that the grantees should build under this covenant. It was also provided in the grant that the said streets and avenues should ever remain public streets and avenues for free and common use. The grantees agreed to pay taxes. There was also a covenant, which, as the Court found, only applied to the excepted portions within the streets and avenues that the grantees would not build the wharves, bulkheads, avenues or streets mentioned in the preceding covenant until permission had been obtained from the City. It was also covenanted that the grantees would not build any wharf or pier in the Hudson River in front

of the granted premises without permission of the City, and this the Court has found only related to the erection of structures westerly beyond the line of and in front of the granted premises, that is, beyond the line of Thirteenth Avenue (*id.*, Decision, pp. 197, 198).

The City covenanted that the grantees respectively

> "shall and lawfully may from time to time and at all times hereafter fully have, and enjoy, take and receive and hold to his own proper use, all manner of wharfage, cranage, advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City, lying on the Westerly side of the hereby granted premises fronting on the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever."
>
> "Excepting therefrom such wharfage, cranage, advantages and emoluments to grow or accrue from the Westerly end of the bulkhead in front of the entire width of the Northerly half part of Thirty-ninth Street and the Southerly half part of Fortieth Street, which shall be and are hereby reserved for the said parties of the first part, their successors and assigns, with full power to collect and receive the same for their own proper use and benefit forever"

(*id.*, Ex. 4, p. 374, Ex. 5, p. 385).

By Laws of 1857, Chapter 763, the State attempted by adopting the Harbor Commissioners' map to establish a bulkhead line 100 feet west of Twelfth Avenue. This line was considerably in-shore of the line established by the Act of 1837 and to which the grants in question extended. Thus, it will be observed that from the maps

forming part of these grants (*id.*, pp. 369, 379) the distance between the westerly side of Twelfth Avenue and the easterly side of Thirteenth Avenue as laid down was from 363 feet at Thirty-ninth Street to 400 feet at Forty-first Street. The Act of 1857 prohibited any solid filling beyond the bulkhead line which it attempted to establish and also prohibited the building of any structure exterior to the said bulkhead line at the *locus in quo*, except piers which should not exceed 70 feet in width, respectively, with intervening water spaces of at least 100 feet. This provision was as follows (Laws of 1857, Chapter 763, Sec. 2):

> "It shall not be lawful to fill in with earth, stone, or other solid material in the waters of said port, beyond the bulkhead line or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of this act, and piers which shall not exceed seventy feet in width respectively, with intervening water spaces of at least one hundred feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond, or outside of the said sea wall."

Chapter 574 of the Laws of 1871 established a Department of Docks of the City of New York which was authorized to adopt a new plan for improving lands under water, wharves, bulkheads, etc. Section 6 of this Act, amending Section 99 of the Act of April 5, 1870, relating to the government of the City of New York provided as follows:

> "3. Said board of the said department of docks shall meet and examine the plans prepared

under their direction, from time to time, and shall, on or before the first day of May, eighteen hundred and seventy-one, determine upon any one of said plans for the whole or any part of said water-front, or may, in its discretion, cause a new plan to be made combining the separate features of any two or more plans, and determine upon such new plan. And said board shall, when it has determined upon any plan or plans for the whole or any part of said water-front, send such plan or plans so determined upon, together with all documents, specifications, estimates and particulars relating thereto, to the commissioners of the sinking fund, who may adopt or reject any such plan or plans. If any such plan is rejected by said commissioners of the sinking fund, the said board shall send another plan in place thereof to said commissioners. The plan or plans adopted by said commissioners of the sinking fund shall be returned by them to the said board, with a certificate of such adoption written thereon, which certificate shall specify the territory or district which said plan shall cover and control, and said plan and certificate shall be filed in the office of said board, and be open to public inspection, and shall, from the time of such adoption, be the sole plan according to which any wharf, pier, bulkhead, basin, dock or slip, or any wharf, structure or superstructure shall thereafter be laid out or constructed within the territory or district embraced in and specified upon such plan, and be the sole plan and authority for solid filling in the water surrounding said city and for extending piers into said waters, and erecting bulkheads around said city; and all other provisions of law

regulating solid filling and pier and bulkhead lines in said waters are to be deemed to be repealed upon the filing of said plan, if said plan be inconsistent with such provisions of law. And said board shall give notice by advertisement for six weeks of the adoption of such plan. From the time of the adoption of said plan no wharf, pier, bulkhead, basin, dock, slip, or any wharf, structure or superstructure shall be laid out, built or rebuilt within such territory or district except in accordance with such plan."

Under this Act the Board of Commissioners of the Department of Docks adopted a plan for a new bulkhead line westerly of the westerly line of Twelfth Avenue, which was 50 feet west of the bulkhead line of 1857, that is, it was 150 feet west of the westerly side of Twelfth Avenue and parallel therewith. The Board of Commissioners also adopted a pierhead line 500 feet westerly from and parallel with the bulkhead line. This plan was subsequently amended by the fixing of a pierhead line 200 feet further westerly, that is, 700 feet west of the proposed bulkhead line. This plan of 1871 provides that that portion of plaintiffs' premises between Twelfth Avenue and a line 150 feet westerly therefrom should be acquired by the City as a part of a marginal wharf, way or place, and that the remaining portion of plaintiffs' premises should be acquired for bulkheads and docks, slips or basins appurtenant to the piers which were to be erected, under the pier plan of 1871, in Thirty-ninth, Fortieth and Forty-first Streets (*Record*, No. 15, Decision, p. 178). The Act of 1871 authorized the Department of Docks to acquire for the City any and all property to which the City did not have title and any rights

and easements pertaining thereto. The provision is as follows:

"4. The said board of the department of docks is hereby authorized to acquire in the name and for the benefit of the corporation of the city of New York any and all wharf property in said city to which the corporation of the city of New York then has no right or title, and any rights, terms, easements and privileges pertaining to any wharf property in said city and not owned by said corporation; and said board may acquire the same either by purchase or by process of law, as herein provided. Said board may agree with the owners of any such property, rights, terms, easements or privileges, upon a price for the same, and shall certify such agreement to the commissioners of the sinking fund, and if said commissioners approve such agreement, said board shall take from such owners, at such price, the necessary conveyances and covenants for vesting said property, rights, terms, easements or privileges in, and assuring the same to, the mayor, aldermen and commonalty of the city of New York forever, and said owners shall be paid such price from the city treasury, as hereinafter provided. If the said board shall deem it proper that the said corporation should acquire possession of any such wharf property, rights, terms, easements or privileges for which no price can be agreed upon between the owners thereof and the said board, the said board may direct the counsel to the corporation of said city to take legal proceedings to acquire the same for the mayor, aldermen and commonalty of said city; and the said counsel to the corporation shall take the same proceedings to acquire the same as

> are by law provided for the taking of private property in said city for public streets or places, and the provisions of law relating to the taking of private property for public streets or places in said city are hereby made applicable, as far as may be necessary, to the acquiring of the said property, rights, terms, easements and privileges, and said board is also empowered to acquire in like manner the title to such lands under water and uplands as shall seem to said board necessary to be taken for the improvement of the water-front." *Laws of 1871, ch. 574, Sec. 6*, amending Sec. 99 of April 5, 1870 relating to the government of the City of New York.

In 1890, the Secretary of War pursuant to Act of Congress established a bulkhead line which ran at the *locus in quo* 150 feet west of Twelfth Avenue and parallel therewith and in 1897 he also re-established a pierhead line 700 feet west of and parallel with the bulkhead line. Thus the bulkhead line passed through plaintiffs' property and the pierhead line lay far beyond it. The Secretary of War did not establish, however, any pier plan, and the pier plan of the City under the Act of 1871 was neither adopted nor sanctioned by the Secretary of War. So far as the Secretary of War's pierhead line was concerned, there was no interdiction of pier or wharf structures, provided they did not extend beyond his line. This appears clearly from the statement which appears on the original of the Secretary of War's map (Defendants' Ex. C) as follows:

> "The bulkhead line defines the limit for solid filling; the pierhead line, the limit to which open piled structures may be built" (*Record*, No. 15, p. 571).

This statement is not found upon the extract in the record (*id.*, p. 529), but will be shown on the duplicate of original which we shall produce upon the argument.

In 1894, as contemplated by the Act of 1871, the City began condemnation proceedings to acquire the plaintiffs' rights and title to the premises in question and commissioners were appointed for that purpose (*id.*, Exs. 12a-15, pp. 397-417). This proceeding dragged along until 1914, when the City discontinued it. Meanwhile, the City erected pier approaches in the streets and built piers which were permanent structures within the lines of Thirty-ninth, Fortieth and Forty-first Streets. Piers were shedded and fences and gates erected, so as to adapt the piers to the exclusive use of the City's lessees and the City leased the piers for such exclusive use upon rentals fixed accordingly which the City has taken to its own use. A number of these leases are described in the amended complaint and admitted in the answer. For example, there is the lease from the City to the New York Horse Manure Transportation Company of March, 1912, for a term of five years with permission to maintain a dumping board with the necessary runways, scale houses and tool houses for workmen upon, over and adjoining the wharf property demised. The rental was four equal quarterly payments of $3,300 each and the lessees covenanted to do such dredging as the City might require in the basin or slips adjoining the premises (*id.*, Ex. 48, p. 468; see also the lease to Burns Bros., Ex. 49, p. 470, to the New York Stock Yards Company, Ex. 50, p. 472, to Central Railroad Company of New Jersey, Ex. 51, 52, 53, pp. 474-476, to Consolidated Gas Company, Ex. 54, p. 477, to Eben E. Olcott, Ex. 55, p. 478). The description of the leases and the rentals received are shown on the rent rolls (Exs. 72-80, pp. 479-487). It

was manifest that these piers were designed and leased to be used in connection with the adjoining slips or basins on plaintiffs' premises and the lessees had the privilege of mooring and docking and loading and unloading vessels alongside their piers and over the plaintiffs' premises. In addition to this, the City and its lessees dredged out the plaintiffs' premises from time to time as they desired.

In short, the City despite the grants in question proceeded under the Acts of 1857 and 1871 to assert proprietary rights in and over the plaintiffs' premises and to appropriate these premises to its own use. In addition, not only were the plaintiffs prevented from building the streets and avenues adjoining the granted premises as contemplated in the grants, but instead of establishing (as provided in the grants) the extended Thirty-ninth, Fortieth and Forty-first Streets, and Twelfth and Thirteenth Avenues as public streets "for the free and common use and passage of the inhabitants of said City," these were extended for the exclusive use of the City and its lessees as proprietors. Thus the plaintiffs were deprived of the entire benefit of their property. Meanwhile they were compelled to pay taxes and the record shows that they paid upwards of $74,000 in the satisfaction of tax liens enforced by the City (*id.*, Stipulation, p. 200; Decision, p. 194).

When the condemnation proceedings were discontinued this suit (No. 15) was brought to prevent the City, its representatives and lessees, from performing acts in derogation of plaintiffs' rights. The facts are not in dispute and are shown in the Decision (*id.*, pp. 171-195). These findings of fact were not disturbed on appeal and stand finally affirmed (*id.*, pp. *c*, 549-551).

The Conclusions of Law of the trial Court setting forth the nature and extent of the plaintiffs' property rights, were, however, modified by the Appellate Division and as modified were affirmed by the Court of Appeals (*id.*). As the order and judgment of the Appellate Division does not set forth the full text of these conclusions as modified, they are for the convenience of this Court set forth below together with the additional conclusions contained in the order and judgment of the Appellate Division (*id.*, Decision, pp. 195-199; Order and Judgment of Appellate Division, pp. 549-551):

Conclusions as Modified:

"(1) 1. That the State of New York has succeeded to all the rights of both the Crown and Parliament in the navigable waters and soil underneath them and was vested with the *jus privatum* or ownership of the soil, and the *jus publicum* or the dominion and control of the navigable waters.

(2) 2. That the Legislature of the State of New York, subject to the restriction imposed by the Federal Constitution, or the Constitution of this State, has the absolute and uncontrollable power to grant the navigable waters in this State, and the land underneath thereof.

(3) 6. By the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Charles E. Appleby and Robert Latou, set forth in the amended complaint, the grantees and their assigns, acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds, with the right to fill in and improve the same at their

pleasure, subject to the Federal Government's power to control.

(4) 8. Subject to the proper regulations of the State or the Federal authorities, the plaintiffs herein could fill in said premises or improve the same with wharves and piers.

(5) 9. The right to fill in or improve said premises as aforesaid, is a vested property right which can not be taken from the plaintiffs, without compensation, except by the paramount right of the Federal Government.

(6) 10. The deeds hereinbefore mentioned should be construed according to the intent of the parties.

(7) 11. The provisions of Chapter 182 of the Laws of 1837 were in full force and effect at the time of the deeds to Appleby and Latou, and said deeds were made and accepted with knowledge of and reliance upon the provisions and effect of said Act.

(8) 13. Easements of light, air and access in the streets and avenues shown on the maps annexed to the deeds to Appleby and Latou, passed upon the delivery of said deeds and are now owned and possessed by the plaintiffs herein to become effective whenever plaintiffs' lands are filled in.

(9) 14. The City of New York has no easement of access by boats over the plaintiffs' premises to the piers in 39th, 40th and 41st Streets between Twelfth and Thirteenth Avenues, and it has no right to dock or moor boats over plaintiffs' said premises, or to use said premises for slips or basins, appurtenant to said piers but until

filled in, the waters over plaintiffs' land are navigable waters subject to public use as such.

(10) 17. Chapter 763 of the Laws of 1857, and the Harbor Commissioner's map of 1857, are not effective as to plaintiffs. Said act and map do not affect the premises at the present time and have no bearing upon the plaintiffs' rights or title herein.

(11) 20. The Acts of Congress and the designation by the Secretary of War of bulkhead pierhead lines did not vest in the City of New York any right or title to the plaintiffs' premises and did not confer upon said city any easements or rights to use plaintiffs' premises for slips and basins, or for access to the piers in the streets.

(12) 25. The plaintiffs should have the costs of this action.

(13) 27. Either party to this action may move at the foot of the judgment for further direction as to the enforcement of the same.

(14) VII. The covenant by the grantee, that he, his heirs and assigns

> 'will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,'

relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.

(15) VIII. The covenant by the grantee, that he, his heirs and assigns

'will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose,'

refers only to the lands under water in front of the plaintiffs' premises and there is no such covenant as to the granted premises between the streets and avenues.

(16) XXIII. The provisions of Chapter 763 of the Laws of 1857 have been repealed except so far as they have been incorporated in the subsequent consolidation acts and Charters (Chapter 410 of the Laws of 1882; Chapter 378 of the Laws of 1897 and Chapter 466 of the Laws of 1901) of the City of New York, in so far as it affects the plaintiffs' rights and title.

(17) I. That the title of the Mayor, Aldermen and Commonalty of the City of New York to the lands under water in the Hudson River adjacent to Manhattan Island were subject to the control and regulation of the State and Federal Governments for the purpose of commerce and navigation.

(18) II. That the grants to Robert Latou and Charles E. Appleby, set forth in Findings of Fact 35 and 37 were issued subject to such restriction.

(19) III. That by the establishment of the bulkhead line of 1871 by the City and the establishment of the bulkhead line by the Secretary of War in the year 1890 co-incident therewith, all of

the Hudson River westerly thereof was declared to be navigable waters of the State and of the United States, and all obstructions except piers to the free use thereof for the purposes of commerce and navigation were prohibited.

(20) V. That so much of the water of the Hudson River as lie easterly of the aforesaid bulkhead line of 1871 and westerly of the easterly side of Twelfth Avenue are open and in use for purposes of commerce and navigation and no action to restrain or prevent the free use of the same by vessels for loading or unloading at the piers aforesaid will lie.

(21) 3. The City of New York is without right to excavate, dredge or remove any soil or part of the granted premises between the streets and avenues east of the bulkhead line of 1890.

(22) 4. The City of New York, its agents, servants, contractors, representatives or assigns, or any person or persons whatsoever claiming to have authority from the said City should be enjoined from excavating, dredging or removing the soil of plaintiffs' said premises east of the bulkhead line approved by the Secretary of War.

(23) 10. The City of New York should be enjoined and compelled to take down and remove the overhanging dumping board or platform now erected on the northerly side of the pier in West 39th Street.

(24) II. That the plaintiff has suffered no damage beyond nominal damages by reason of the dredging of the soft yielding mud by the City in the area between 38th and 42d Streets westerly of Twelfth Avenue.

(25) That judgment be entered herein in accordance with the foregoing findings of fact and conclusions of law."

Additional Conclusions:

"26. The Legislature of this State extinguished the '*jus publicum*' in the lands under water granted to plaintiffs' predecessors in title and such grants are irrevocable and inviolable.

27. Chapter 182 of the Laws of 1837 vested in the Mayor Aldermen and Commonalty of the City of New York the entire and absolute right and title of the State to lands under water between the Streets and Avenues, and also gave said City power and authority to convey the absolute right and title of said premises to the owners and the adjacent upland, subject only to the power of the Federal Government to regulate commerce.

28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890.

29. The action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund in 1916 does not impair or destroy the property and rights of the plaintiff.

30. Said action of the Dock Commissioners with the approval of the Commissioners of the Sinking Fund, does not prohibit the plaintiffs from filling in said premises out to the bulkhead line established by the Secretary of War.

31. The deeds by the City in the years 1853 1854 to Appleby and Latou, respectively, for a valuable consideration and certain covenants and agreements therein contained, formed valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation.

32. The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and through the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue.

33. The plaintiffs are not entitled to an injunction restraining The City of New York from

using or authorizing the use by others of the plaintiffs' premises either within or without the Federal bulkhead line, for the purpose of mooring, docking and floating boats."

With respect to case No. 16 little need be added to what has been said in the preliminary statement. It will be noted, however, that in the conclusion of law No. 29 in case No. 15, above quoted it was held that the action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund in 1916 did not impair or destroy the property and rights of the plaintiffs. This plainly meant that this action of 1916 could not be allowed to have this effect because of the plaintiffs' rights. What was done in 1916, while the suit No. 15 was pending, is fully shown in the record in No. 16.

The Act of 1871, with amendments, relating to the improvement of the waterfront, were carried forward first into the Consolidation Act of 1882 (Laws of 1882, Chapter 410, Secs. 711 *et seq.*) and later into the Greater New York Charter. Under this Charter, the Commissioner of Docks was authorized with the approval of the Commissioners of the Sinking Fund to adopt and execute plans for the waterfront and to fix and establish the line of solid filling, bulkhead and pierhead lines, the distance between the piers, method and character of construction of wharves and piers within the entire territory of the City of New York.

The provisions of the Charter in force at the time of the adoption of the "new plan" of 1916 were as follows:

"§817. All the powers and duties heretofore vested in and devolved upon the department of

docks of the mayor, aldermen and commonalty of the city of New York, are devolved upon and vested in the department of docks hereby created and in addition thereto the powers and duties of said department are hereby extended so as to include all the water front, wharf property, lands under water, wharves, piers, bulkheads and structures thereon, situate, within the county of Kings; the county of Richmond and the county of Queens; and the said commissioner of docks shall have power, by and with the approval of the commissioners of the sinking fund, to adopt and execute a plan or plans for the water front of the city of New York, as constituted by this act, and to fix and establish the line of solid filling, bulkheads and pierhead lines, the distance between piers, method and character and construction of wharves and piers within the entire territory of the city of New York, as constituted by this act.

§818. * * * The commissioner of docks shall not have power to change the exterior line of piers and bulkheads, established by law, except by the adoption of a plan or plans for the improvement of the water front of the city of New York as herein constituted, by and with the approval of the commissioners of the sinking fund. * * *

§819. * * * No wharf, pier, bulkhead, basin, dock, slip, exterior street or any wharf, structure or superstructure shall be laid out, built or rebuilt, within such territory or district except in accordance with such plan or plans, provided that said commissioner of docks, with the consent and approval of the commissioners of the sinking fund, may, from time to time, change the width or location of the piers laid down on said plan or plans;

and provided, also, that said commissioner of docks may build, or rebuild, or license, or permit the building or rebuilding, of temporary wharf structures, and said commissioner may lease land covered with water belonging to the city of New York for the purpose thereof, such lease, or permit to continue and remain at the will and pleasure of said commissioner, or for a time not longer than until the wharves, piers, bulkheads, basins, docks, or slips to be built or constructed according to such plan or plans, shall in the judgment of said commissioner, require and need to be built or constructed; and provided, further, that the commissioner of docks with the consent and approval of the commissioners of the sinking fund may alter and extend the present pier head line, as now established, on the Hudson River, between Battery Place and Seventieth Street, and establish a new pier head line between these points, and may authorize the construction of new piers out to said pier head line, and may extend those piers already built out to said line; and may build new piers or extend piers already built, out to such pier head lines as are now or may hereafter be established by the secretary of war under act of congress. The commissioner of docks is hereby authorized and empowered, with the consent and approval of the commissioners of the sinking fund, after a public hearing shall have been given by said commissioners of which hearing and its purposes at least seven days' notice shall be published in the City Record, to alter, amend and modify any and all existing plans for the improvement of the water front hereinbefore recited or which may have been determined upon or adopted in pursuance hereof notwithstanding that any or all of such plans may

> have been wholly or partially physically perfected and improvements made in conformity therewith. And any such alteration, amendment or modification may include the elimination and closing of any marginal wharf, street or place shown on any plan, whether or not such marginal wharf, street or place has ben physically constructed, and any such altered, amended, or modified plan or any new plan determined upon or adopted in pursuance of the provisions of this section need not provide for or show any such marginal wharf, street or place. * * *"

In pursuance of this legislative authority, the Department of Docks on May 1, 1916, proceeded to amend the plan for the water front betwen West Thirty-eighth Street and West Forty-second Street on the Hudson River so as to discontinue the bulkhead line as it had been fixed and to establish a "new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place" (*Record*, No. 16, pp. 59-60). The Commissioners of the Sinking Fund approved this new or amended plan (*id.*, pp. 57, 60, 61) which accordingly became effective so far as legislation of the State could make it effective. It was solely because of this new plan that the Commissioner of Docks rejected the plaintiffs' application for permits to proceed with the improvement of their property (*id.*, p. 35) and this new plan and its requirements were the only answer presented in the affidavit of the Commissioner of Docks, which constituted the only pleading in opposition to the petition for *mandamus* (*id.*, pp. 64, 65, 67, 68) and is recited in the order denying the application (*id.*, pp. 3-4).

Errors Relied On.

Without repeating the various assignments of error in the two cases (*Records*, No. 15, pp. 574-578; No. 16, pp. 81, 82), the errors complained of may be summarily stated as follows:

As to No. 15:

(1) The State court erred in holding that the action of the Secretary of War in fixing a pierhead line (which lay far outside the limits of plaintiffs' premises) had the effect of altering or limiting the plaintiffs' rights as against their grantor, the City of New York. The plaintiffs are not seeking to fill in beyond the Secretary of War's bulkhead line, and do not assert any rights with respect to piers beyond the Secretary of War's pierhead line. To the extent of the plaintiffs' grants, beyond that bulkhead line and within that pierhead line, the Act of Congress and the action of the Secretary of War in exercising authority thereunder in no way changed the plaintiffs' contracts with the City or their proprietary rights under their grants. As against the City, the plaintiffs had absolute title in fee simple according to their grants with all the rights of improvement which went with that ownership, subject only to the appropriate control of the Federal Government. If the City desired to reinvest itself with these proprietary rights in order to carry out its new plans, it was bound to acquire the plaintiffs' title by appropriate condemnation proceedings and the payment of just compensation.

(2) In view of plaintiffs' rights of property and the guarantees of the Federal Constitution protecting them,

the relief granted by the State court was inadequate and the plaintiffs are entitled to an injunction restraining the City of New York, its representatives and lessees, from asserting and exercising proprietary rights over the plaintiffs' property as prayed for in their complaint.

As to No. 16:

(3) The State court erred in giving effect, by the order denying a *mandamus*, to the new plan of the City, the adoption of which constituted legislative action in deprivation of plaintiffs' rights under their grants. Under these grants, in accordance with their true construction (which this Court when the question of impairment of obligations of contracts is involved will determine for itself) and in accordance with the construction placed upon them by the final judgment of the State court in No. 15, the City and its representatives had no right to refuse permission to the plaintiffs properly to improve the granted property. The only extent to which the permission of the City could be required is with respect to such police regulations as might be appropriate in relation to the execution of the work. The permission of the City through its Department of Docks was not refused upon any such ground, or because the plaintiffs' plans of improvement were not appropriate, but simply because the City had attempted to lay down a new plan depriving plaintiffs of their rights.

(4) The State court erred in not giving judgment for the plaintiffs awarding them a *mandamus* as sought.

POINTS.

In support of the assignment of errors, we present the following points:

First. It was competent for the State of New York to establish the *ripa* about the City of New York and to make or provide for grants on valuable consideration of title in fee simple in pursuance of a plan for water front improvement. Such action was subject to the controlling authority of Congress in the regulation of interstate and foreign commerce, but aside from conflict with that paramount authority, and as between the State and grantees, the grants made by the State or by the City under its authority are inviolable.

Second. The grants in question conveyed title in fee simple to the premises described. The *jus publicum* was extinguished and the grants conveyed absolute title to the grantees according to the terms of the grants.

Third. The action of the Secretary of War in defining bulkhead and pierhead lines merely limited the plaintiffs' rights accordingly. They still enjoyed the absolute right to fill in the premises up to the bulkhead line so determined and to improve their premises beyond the bulkhead line in a manner consistent with the lines of the Secretary of War. The attempt of the State and of the City under its authority to prevent the erection of piers over the plaintiffs' premises outside the bulkhead line and not in conflict with the Secretary of War's pierhead line was a violation of the plaintiffs' rights of property.

Fourth. With respect to the requirement of permission by the City for making of the plaintiffs' improve-

ments, this Court will determine for itself the true construction of the grants.

Fifth. The true construction is that the plaintiffs are entitled to improve the granted premises in accordance with the terms of the grants, at their pleasure and without the consent of the City of New York. At most, the City could only insist upon a reasonable police supervision.

Sixth. The adoption of the new plans of 1871 and 1916 by the Department of Docks with the approval of the Commissioners of the Sinking Fund under the provisions of the Act of 1871 and the Greater New York charter was legislative action within the meaning of the contract clause of the Federal Constitution.

Seventh. The State court in the *mandamus* proceeding gave effect to this action impairing the obligation of the plaintiffs' contract.

Eighth. The plaintiffs are entitled to judgments in both cases protecting their grants and property rights.

Argument.

First. It was competent for the State of New York to establish the *ripa* about the City of New York and to make or provide for grants on valuable consideration of title in fee simple in pursuance of a plan for water front improvement. Such action was subject to the controlling authority of Congress in the regulation of interstate and foreign commerce, but aside from conflict with that paramount authority and as between the State and grantees, the grants made by the State or by the City under its authority are inviolable.

There can be no question here of the power of the State to convey absolute title to the premises in question. When the Revolution took place, the people of each State became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government (*Martin* v. *Waddell*, 16 Pet. 367, 410). "The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce" (*Hardin* v. *Jordan*, 140 U. S. 371, 382).

See also

Den v. *Jersey Company*, 15 How. 426, 432, 433;
Weber v. *Harbor Commissioners*, 18 Wall 57, 65, 66;
Barney v. *Keokuk*, 94 U. S. 324, 338;
Packer v. *Bird*, 137 U. S. 661, 669;
St. Louis v. *Rutz*, 138 U. S. 226, 242;
Manchester v. *Massachusetts*, 139 U. S. 240, 257;
Shively v. *Bowlby*, 152 U. S. 1, 15 *et seq.*;
Philadelphia Company v. *Stimson*, 223 U. S. 605, 632.

The well established principle was stated recently in *Port of Seattle* v. *Oregon & Washington R. R. Co.*, 255 U. S. 56, 63, as follows:

> "The character of the State's ownership in the land and in the waters is the full proprietary right. The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights."

The principle that the State of New York is fully competent, when its action is not in conflict with the exercise of Federal authority, to make absolute grants in fee simple of water lots or land under water along and in navigable streams has had abundant recognition by the courts of the State of New York and underlies the development of the water front of the City of New York.

In *Towle* v. *Remsen, et al.*, 70 N. Y. 303, 308, the Court said:

> "The land under water originally belonged to the Crown of Great Britain, and passed by the Revolution to the State of New York. The portion between high and low water mark, known as the *tide-way*, was granted to the city by the early charters (Dougan charter, Secs. 3 and 14; Montgomerie charter, Sec. 37), and the corporation have an absolute fee in the same (*Nott* v. *Thayer*, 2 Bosw. 61). It necessarily follows that the city had a perfect right, when it granted to the devisees of Clarke, to make the grant of their portion of the land in fee simple absolute. As to the land outside of the *tide-way*, the city took title under chapter 115 of the laws of 1807, with a proviso giving the pre-emptive right to the owners of the adjacent land in all grants made by the corporation of lands under water granted by said act. * * * The Legislature left it to the city to dispose of the interests mentioned upon the proviso referred to; but it enacted no condition that it should not dispose of that which it owned in fee simple upon such terms as it deemed proper, and in the absence of any such enactment, such a condition cannot be implied."

In *Langdon* v. *Mayor*, 93 N. Y. 129, 155, the Court said:

> "In this country the State has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the State. * * *

* * * These powers result from its sovereignty, and the absolute control which, in consequence thereof, it has over the public domain within its limits. The right to grant the navigable waters is as absolute and uncontrollable (except as restrained by constitutional checks) as its right to grant the dry land which it owns. It holds all the public domain as absolute owner, and is in no sense a trustee thereof, except as it is organized and possesses all its property, functions and powers for the benefit of the people.

If the grant to Astor had been made directly by the legislature, or by the commissioners of the land office, under its authority, it would have been inviolable as a contract within the protection of the Federal Constitution, the obligation of which no legislative act could impair (*Fletcher* v. *Peck*, 6 Cranch, 136). It matters not that the grant would limit the power of the State in the exercise of its sovereignty over the public waters, and would so far limit and control future legislatures. The same is true of all grants by the State of any part of the public domain. When valid grants are once made, they are inviolable, and the property granted can be resumed by the State, when needed for public use, only upon making compensation."

In *Williams* v. *The Mayor*, 105 N. Y. 419, 428, 429, referring to the grants of the water front to the City of New York, and particularly to the Act of 1813, the Court said:

"The authority thus given being commensurate with the municipal limits, involved a grant of so

much of the land of the State under water as those wharves would occupy if the city's choice of location required such appropriation. This right was tantamount to an ownership. It embraced the entire beneficial interest, and was inconsistent with any title remaining in the State. The wharf when built completely occupied the land under water, and might be built, if need be, of stone and earth. All use for the floating of vessels disappeared, so far as it occupied the water. The new and substituted use created by the city or its grantees belonged wholly to them, for the entire benefit in the form of shippage, wharfage and cranage, was given to them. There was never any restraint put upon this general grant, and the ownership involved where the plans carried the wharves on to the State's land in the stream, except the limitation of exterior lines beyond which the authority should not go, or that imposed by general plans agreed upon by both parties * * *.

* * * So that when the State granted to the city wharf rights which might extend into the deep water covering its own land it granted two things: property in the land covered by the wharf and occupied by it and an easement for approach of vessels in its front. That easement the State by its own sole action could not take away or destroy without awarding adequate compensation."

See also,

Mayor v. *Law*, 125 N. Y. 380, 390, 391.

In *People* v. *Delaware & Hudson Company*, 213 N. Y. 194, 199, the Court said:

> "The title to the bed of navigable streams and the control of navigable waters are vested in the state, subject to the limitations found in the Federal Constitution. (*Langdon* v. *Mayor, etc., of N. Y.*, 93 N. Y. 129.) The state, except for such limitations, has power to grant the title to lands under water, unconditionally or conditionally, or it may grant special rights therein, or it may restrict the boundaries of navigable waters by defining the same."

The familiar doctrine was restated in *People* v. *Steeplechase Park Co.*, 218 N. Y. 459, 479, 480 as follows:

> "During all our history that legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters. The public interest may require the building of docks and piers to facilitate approach to the channel of such navigable waters. The beneficial enjoyment of land adjoining the channel of public waters may require or at least justify the conveyance of lands below high water on which to erect buildings. As in England the crown and Parliament can without limitation convey land under public waters, so in this state land under water below high-water mark can be conveyed by the legislature, or in accordance with constitutional and legislative direction. Where the state has conveyed lands without restriction intending to grant a fee therein for beneficial enjoyment, the title of the grantee except as against

> the rights of riparian or littoral owners, is absolute, and unless the grant is attacked for some reason recognized as a ground for attack by the courts or the use thereof is prevented by the Federal government, there is no authority for an injunction against its legitimate use."

General expressions here and there in opinions of the State court cannot be taken as qualifying this fundamental doctrine of the *power* of the State. The statements that may be invoked as qualifications can readily be shown not to apply to the State's competency to make absolute grants of water lots and land under water in navigable waters in fee simple, subject only to appropriate Federal control, but to relate to the construction of particular legislation or of the grants themselves or to restrictions under the State constitution. Thus the rights involved may be those only of riparian owners or the Court may be dealing with rights in public streets validly established or with mere licenses. Statements in judicial opinions in such cases have no application here where the grants are in fee simple. The power of the State to make such grants cannot be questioned.

Second. The grants in question conveyed title in fee simple to the premises described. The *jus publicum* was extinguished and the grants conveyed absolute title to the grantees according to the terms of the grants.

Grants of this character were essential to the growth and development of the City of New York. The tideway was granted to the City by the early charters, and the corporation has an absolute fee in it (*Fowle* v. *Remsen*, 70 N. Y., p. 308).

By the Laws of 1807, Chapter 115, the City took title to a strip running 400 feet into the Hudson River from low water mark. Later the Laws of 1837, Chapter 182, which we have quoted above, established the permanent *ripa*. Thirteenth Avenue as laid out in the map to which the Act referred was made a permanent exterior street, and the City of New York was vested with all the right and title of the people of the State to the westerly side of Thirteenth Avenue. The City having title was empowered to make grants of the lands under water out to Thirteenth Avenue and did make them. The title was granted to the City in order that it might make grants to private persons for their beneficial use; that is in order that it might make definite and irrevocable grants in fee simple. The grants here in question conveyed in fee the premises described in each grant,

> "together with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining;
>
> And, also all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part" (the Mayor, Aldermen and Commonalty of the City of New York, that is, the City), "of, in, and to all the said premises and every part and parcel thereof, with the appurtenances" (*Record*, No. 15, p. 368).

There has never been any ground for attack upon these grants under the State Constitution, and no such attack has been made. The grants were made under authority held to be validly conferred. They were not gifts but were made upon valuable and substantial consideration. No question of reasonableness arises, as the

property granted was reasonable in extent and the grants conformed to the established plan for water front improvement. In 1837 when the Smith Map (*Record*, No. 15, Ex. 1, p. 365) was made, the shore line of the Hudson River was very irregular, extending inland at the *locus in quo* nearly as far as Eleventh Avenue. In front of this shore line were mud flats covered by very shallow water. Even as late as 1884 the water over these lands between West 39th and West 41st Streets, so far out as the bulkhead line, was only three or four feet deep. So it is evident that when the grants in question were authorized in 1837, and were made in 1852 and 1853, that these mud flats were in no way necessary for navigation, being removed from the channel or navigable part of the stream. It cannot be said that it was unreasonable, on the contrary it was most reasonable and for obvious public benefit, that these mud flats should be filled in for beneficial purposes. It was entirely competent for the City to plan, and for the State to approve, the establishment of an exterior avenue such as Thirteenth Avenue and to make grants to private persons of the land within the lines of the streets and avenues as thus laid down.

These grants belong to a class of grants, with substantially the same terms, of various water lots and lands under water similar to the *locus in quo*, which the State court has held in many cases operated as conveyances of absolute title in fee simple.

Thus, in *Duryea* v. *Mayor*, 62 N. Y., 592, 596, referring to such a grant on the East River, the Court said:

> "The estate granted is a fee simple, and the deed confers upon the grantee and its assigns all

> the rights and privileges of an absolute owner except as restricted by the covenants and reservations contained in it."

In *Langdon* v. *Mayor*, 93 N. Y. 129, referring to a grant made by the City of a portion of the lands under water embraced within the grant to the City by the Act of 1807 the Court said (p. 145):

> "We think it equally clear that whatever title and property rights the City thus obtained, it could transfer and convey to individuals. Having the power to extend the *ripa* around the City, and thus make dry land, it could authorize any individual to do it. Whatever wharves and docks it could build, it could authorize individuals to build, and whatever wharfage it could take, it could authorize individuals to take. Its dominion over the lands under water, certainly for the purposes indicated in the preamble contained in Section 15 above cited was complete." (The preamble in Section 15, to which reference is made, declared the purpose of erecting and constructing slips and basins and running out wharves and piers.)

Again, in *Mayor* v. *Law*, 125 N. Y. 380, 391, the Court said with respect to a grant in similar terms of land under water made by the City in 1829:

> "The grantee became the absolute owner of the land between the streets—the land granted, and that he could fill up whenever he chose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up."

See also:

Furman v. *Mayor*, 10 N. Y. 567, 569, 570;
Williams v. *Mayor*, 105 N. Y. 419, 433.

We do not consider it to be necessary to review the long line of authorities in New York, to analyze the opinions and to attempt to define the particular points decided in various cases, for *the record in the present case* is conclusive with respect to the nature and operation of the grants in question.

The construction of these grants, as being grants in fee simple, was recognized in No. 15 by the Appellate Division, whose order and judgment were affirmed by the Court of Appeals. Judge Laughlin, writing for the Appellate Division said (*Record*, No. 15, p. 557; *Appleby* v. *City of New York*, 199 App. Div. 539, 542, 543):

> "It is well settled that these were beneficial grants as distinguished from grants expressly made for the purpose of promoting commerce; and so far as the State and the city were concerned and subject only to the control of the United States over navigable waters, the grantees from the city acquired an absolute right to fill in the premises granted between the street and avenue lines, but not to make the streets, avenues, bulkheads and wharves until called upon by the city so to do, or until the city approved plans therefor, and thenceforth any and all rights of the State or the city to claim that any of the waters within the lines of the premises so granted were navigable were abandoned."

And, despite various expressions which are not altogether clear in the opinion of the Court of Appeals, it would seem that the principle of construction so far as the grants in question were concerned was recognized. For the Court said (*Record*, No. 15, p. 568; *Appleby* v. *City of New York*, 235 N. Y. 351, 361):

> "But the United States acts as sovereign and the state of New York acts also as proprietor. The authority of the state in its governmental capacity over the waters of the Hudson within its limits is plenary, subject only to such action as Congress may take. (*Montgomery* v. *Portland*, 190 U. S. 89; *Matter of Public Service Commission*, 224 N. Y. 211.) It might have improved the water front itself. It had, however, granted all its title to the premises to the city of New York. The city might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips."

And again the Court of Appeals said in closing its opinion (*Record*, No. 15, p. 569; 235 N. Y., p. 363):

> "* * * The right of the grantee to fill in his land under water with solid filling (*Duryea* v. *Mayor*, 62 N. Y. 592, 597; 96 N. Y. 477, 496) is a delegated exercise of the public right in aid of commerce and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. But such grant having once been made, titles traced back to the state as proprietor may not be divested by such regulations, without compensation.
>
> The grant to plaintiffs being a property right

> which can be resumed by the city only on payment of compensation, was a grant of all the title the city had to convey. The right of the public was not thereby extinguished. The city had the right to dredge out all the lands under water between the piers to promote navigation. The establishment of the bulkhead line does not conflict with the right of the city in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the city to convey to private owners."

But we are not remitted to the endeavor to construe either the opinion of the Appellate Division or of the Court of Appeals in the present case, or in other cases, for we have in the record in No. 15, *Appleby* v. *The City of New York*, the definitive judgment entered. This constitutes the conclusive determination, so far as the State Court is concerned, of the construction and effect of the grants in question. The Judgment in the trial Court was entered upon its Decision containing the findings of fact and conclusions of law concerning the issues raised by the pleadings and directing the entry of judgment (*Record*, No. 15, Judgment, p. 202). The Appellate Division of the Supreme Court expressly affirmed the findings of fact of the trial Court and modified and added to the conclusions of law of that Court. The Appellate Division set forth the modifications and the additional conclusions in its order and judgment (*id.*, pp. 549-551). Except as thus modified and added to, the findings and conclusions of the trial Court were affirmed (*id.*, p. 551). The Court of Appeals on cross appeals affirmed the judgment of the Appellate Division (*id.*, pp. a, b, c). The

Decision upon which the final judgment thus affirmed rests, and its findings of fact and conclusions of law, constitute a final and conclusive determination, an estoppel of record as between these parties, so far as the State court is concerned and except as the plaintiffs-in-error challenge the determination in this Court. This judgment and final determination as the record discloses it could not be altered by any expression in the opinion of the Appellate Division or Court of Appeals. The Appellate Division modified the Decision and the Judgment based upon it and what it did in settling the Decision and the Judgment constitutes its determination, not what it said in its opinion. Similarly, the Court of Appeals affirmed the judgment of the Appellate Division and that record became its determination, not what it said in its opinion.

What was thus determined in the Decision modified by the Appellate Division and in the Judgment reciting it and based upon it, and finally affirmed, is not left to inference. It is set forth in unusually explicit terms. We have in our statement of the case quoted in full the conclusions of law thus made and finally established as a determination of the nature and effect of the grants in question, so far as the State courts are concerned, and we need only refer to a few of them in order to establish the proposition that these grants conveyed to the grantees absolute title to the premises in question in fee simple and according to the terms of the grants.

Thus it was determined in Conclusion 3 (*Record*, No. 15, p. 195) as modified by the Appellate Division (*id.*, p. 549):

> "By the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Charles

> E. Appleby and Robert Latou, set forth in the amended complaint, the grantees and their assigns, acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds, with the right to fill in and improve the same at their pleasure, subject to the Federal Government's power to control."

Again, it was determined in Conclusion 5, as modified by the Appellate Division (*id.*, pp. 196, 549):

> "The right to fill in or improve said premises as aforesaid, is a vested property right which cannot be taken from the plaintiffs, without compensation, except by the paramount right of the Federal Government."

And not content with these definitive conclusions, the Appellate Division added the following (*id.*, p. 550):

> "26. The Legislature of this State extinguished the '*jus publicum*' in the lands under water granted to plaintiffs' predecessors in title and such grants are irrevocable and inviolable.
>
> 27. Chapter 182 of the Laws of 1837 vested in the Mayor, Aldermen and Commonalty of the City of New York the entire and absolute right and title of the State to lands under water between the Streets and Avenues, and also gave said City power and authority to convey the absolute right and title of said premises to the owners and the adjacent upland, subject only to the power of the Federal Government to regulate commerce.

28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890.

* * * * * * * *

31. The deeds by the City in the years 1853 and 1854 to Appleby and Latou, respectively, for a valuable consideration and certain covenants and agreements therein contained, formed valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation."

When, therefore, we urge that the *jus publicum* in the premises in question had been extinguished, we are merely stating what the Decision and Judgment in No. 15 explicitly determines. So far as these parties are concerned, it is really not of consequence to examine the precedents in the State court, or even to analyze the opinion of the Court in the present case and its remarks upon *jus publicum* and *jus privatum*, for it has been finally determined after a full litigation between these parties that with respect to the premises embraced in the grants in question the *jus publicum* was extinguished. We think it could easily be shown, to the point of demonstration, that this is the effect of numerous decisions in the State court and that these conclusions we have quoted necessarily followed from the applicable precedents. We could also show that the general expressions which counsel for the City may cite to the contrary are not really in opposition to these precedents when the particular points involved in those expressions

of opinion are considered. But whatever may be said with respect to the efficacy of such a line of argument, it is not needed here because of the explicit terms of the Decision and Judgment.

As it is thus determined that the grantees under the grants in question acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to their grants, with the right to fill in and improve the same at their pleasure, subject to the Federal Government's control; as it is determined that the *jus publicum* in these premises was extinguished; as it is determined that the grants were made under competent authorization and constitute valid contracts which could not be impaired by subsequent legislation by the State of New York without compensation; we deem it unnecessary to argue the point that these grants are inviolable.

All that is needed is to carry this principle to its logical conclusion, to give effect to these grants as valid grants, according to their terms, to award to plaintiffs the constitutional protection to which they are entitled by reason of their contracts and property rights. The State court in its decision and judgment sustained the grants but after holding them to be conveyances of the absolute title, and after determining that the grantees could not be deprived of their property without compensation, proceeded to deny protection to the property to the full extent to which the plaintiffs were entitled, both with respect to certain incidents of their ownership and in the relief afforded.

This brings us to the question of the effect of the Secretary of War's action in defining bulkhead and pierhead lines.

Third. The action of the Secretary of War in defining bulkhead and pierhead lines merely limited the plaintiffs' rights accordingly. They still enjoyed the absolute right to fill in up to the bulkhead line so determined and to improve their premises beyond the bulkhead line in a manner consistent with the lines of the Secretary of War. The attempt of the State and of the City under its authority to prevent the erection of piers over the plaintiffs' premises outside the bulkhead line and not in conflict with the Secretary of War's pierhead line was a violation of the plaintiffs' rights of property.

There is no controversy with respect to the Secretary of War's bulkhead line; that bulkhead line could not, in the light of the terms of the grants in question, have been established by the State inshore of the exterior line fixed by the plaintiffs' grants. That would have constituted action by the State in derogation of the rights and property specifically granted. But the grant of the City with the authority of the State was, of course, subject to the paramount authority of Congress in the regulation of interstate and foreign commerce, and it was in pursuance of this paramount power that the Secretary of War fixed the bulkhead line. His action, which defined the same bulkhead line as that attempted to be defined by the City under the Act of 1871, was determinative although the action of the State alone could not be. This bulkhead line was the line of solid filling and the plaintiffs could not fill in beyond that line. As we shall see later, with reference to the final order entered in the *mandamus* proceeding (No. 16), the City has sought to prevent, and by that order has succeeded in preventing,

the plaintiffs from filling in even up to the bulkhead line; that is, the City has attempted to make a new bulkhead line inside of the Secretary of War's bulkhead line and to deprive the plaintiffs of their right to fill in up to the latter. But this is with respect to the order in No. 16. The order and judgment of the Appellate Division, which was finally affirmed in No. 15 determined in so many words that

> "28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890" (*Record*, No. 15, p. 550).

So that, so far as the judgment in No. 15 is concerned, with respect to the rights of the parties under the grants, there is no controversy with respect to the *bulkhead* line.

There is, however, a serious question presented with respect to the Secretary of War's *pierhead* line and an effect was given to his action in fixing the pierhead line which we believe to be entirely unwarranted.

While the enjoyment by the plaintiffs of the property and rights granted was subject to the proper action of Congress under the commerce clause, it is evident that the plaintiffs retained their full rights under their grants, and were entitled to be protected in their enjoyment, except so far as appropriate Federal action interfered therewith. The Secretary of War's action in fixing a pierhead line merely established the limit to which piers could be built outside the bulkhead line. This limit was

700 feet beyond the bulkhead line. This was far beyond the limit of the premises granted to the plaintiffs; it was far beyond the westerly side of Thirteenth Avenue as originally planned. There was between the bulkhead line fixed by the Secretary of War and his pierhead line a considerable space which was covered by the plaintiffs' grants. The plaintiffs, it is true, after the bulkhead line had been fixed by the Secretary of War could not fill in beyond that line, but they had acquired through the grants all the rights of the City in and to the space between that bulkhead line and the exterior line of their grants, and this space they were fully entitled to use as the City could have used it. The action of the Secretary of War in no way interfered with this use so long as piers were not extended beyond his pierhead line.

The grants in question conveyed the premises between the streets and avenues described "with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining," and also conveyed "all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part" (the City) "of, in and to all the said premises and every part and parcel thereof, with the appurtenances" (*Record*, No. 15, pp. 368, 381). Moreover, the grantees were respectively entitled to "have, enjoy, take and receive and hold to his own proper use, all manner of wharfage, cranage, advantages or emoluments growing or accruing by or from that part of the exterior line of the said City lying on the westerly side of the hereby granted premises fronting on the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever" (*id.*, pp. 374, 385). There was excepted from this the wharfage, cran-

age, advantages and emoluments growing or accruing from the westerly end of the bulkhead in front of the streets, but this was solely with respect to the part of the bulkheads in front of the streets and not to the wharfage, cranage, advantages or emoluments which might grow or accrue from the part of the exterior line of the city, as defined in the grants, lying on the westerly side of the granted premises, that is, between the streets.

There were thus important rights and privileges as to the spaces between the Secretary of War's bulkhead line and his pierhead line which the City, except for its grants, could have used to profit, and which the grantees of the City under valid grants were entitled to use to profit.

It should be emphasized that the Secretary of War in defining the pierhead line did not adopt the City's pier plan or regulate the spaces between piers. So long as solid filling did not go beyond his bulkhead line, and piers did not go beyond his pierhead line, it was entirely competent, so far as the Federal Government was concerned, for the grantees of the City to build whatever piers they chose, not of solid filling but of open piled work, upon the premises granted to them. In Defendant's Exhibit C (*Record*, No. 15, p. 529) giving an extract from the map of the Secretary of War showing his pierhead line of 1897, only a part of the map is shown. We shall produce a duplicate of original upon the argument. It is an authenticated document of the Federal Government, about which there can be no dispute and it bears this note:

> "The bulkhead line defines the limit for solid filling; the pierhead line, the limit to which open piled structures may be built."

If the Court will refer to the official document containing the description of the pierhead and bulkhead lines published by the War Department (War Department, Corps of Engineers, United States Army, "Detailed Descriptions of the Pierhead and Bulkhead Lines for the Waterfronts of Part of the City of New York," approved by the Assistant Secretary of War, February 15, 1902, G. L. Gillespie, Brig. Gen., Chief of Engineers, United States Army, 1902), the Court will find on pages 31-33 the definition of the pierhead lines. There is no adoption of a pier plan within the pierhead line and no determination as to the spaces between the piers. On the contrary, as shown by the note upon the Secretary of War's map there was no prevention by his line of open piled structures. Can it be seriously questioned but that if the City had not made these grants, and had not changed its plans, it could have put in open piled structures running out from the bulkhead line at the *locus in quo* to the Secretary of War's pierhead line? And what the City could have done, had it not made these grants, its grantees are entitled to do by the very terms of the grants.

Now, of this important right thus to enjoy and improve their property, the plaintiffs, notwithstanding that they have invoked the guarantees of the Federal Constitution, have been deprived by the State. The State Court in No. 15, as well as in No. 16, has disregarded this right and denied the protection to which the plaintiffs are entitled.

The decision upon this point is found in Conclusion No. 32 of the Appellate Division, as follows:

> "The Federal statutes and the action of the Secretary of War in establishing a bulkhead line

across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and through the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue" (*Record*, No. 15, p. 550).

This determination, we contend, is erroneous for these reasons:

(1) It is recognized that "the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space."

This, as it seems to us, shows conclusively that the plaintiffs' rights, with respect to the space between the bulkhead line and the pierhead line, did not conflict with the action of the Federal Government.

(2) It is said that "the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines."

But it is submitted that the State Government had no more right, in derogation of the plaintiffs' grants, to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines than they had the right to regulate the construction of bulkheads or lines of solid filling within the premises granted to the plaintiffs. The deeds to the plaintiffs did not stop at the line subsequently fixed as the bulkhead line, but ran to Thirteenth Avenue, the exterior street laid down on the plan of 1837. As against the City and the State, the plaintiffs' rights extended throughout the premises granted, excepting only the portions of the plot that lay within the streets and avenues. If, as the Court below found in Conclusion 29 (*id.*, p. 550) that the changing of the bulkhead line in 1916 could not impair the property and rights of the plaintiffs, how could the action of the City after the making of the grants, in attempting to establish a pier plan, interfere with the property and rights of the plaintiffs? There was only one power which could interfere with the property and rights of the plaintiffs and that was the Federal Government acting under authority of Congress in the regulation of interstate and foreign commerce.

(3) Again, it is said, in the Conclusion above quoted, that the State "having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials to

adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue."

This is a clear statement of precisely what the State had no right to do. It is a definite statement of subsequent legislation impairing the obligation of the plaintiffs' contracts. It is an assertion of the right of the State to destroy *pro tanto* the plaintiffs' grants. It is said that the plaintiffs are prevented from erecting any pier, wharf or structure whatsoever upon their premises between the bulkhead line and the Secretary of War's pierhead line. The Secretary of War has said that his pierhead line does not prevent open piled structures in this space. Thus the State, despite the grant made under its authority of absolute title in fee simple, as the Court has held, has attempted to prevent, with respect to the premises within the limits of the grant, precisely what the Secretary of War permits.

In short, by the determination of the State Court, effect is given to the legislation of 1857 and 1871, subsequent to the grants, in taking away from the plaintiffs all enjoyment of the property granted outside the Secretary of War's bulkhead line. They cannot build piers; they cannot build any structure. They cannot have wharfage or cranage at the bulkhead line or anywhere. Not only is this true, but instead of building streets and avenues bordering the granted premises, which as the

grants provided should be open for the common use of the inhabitants of the City and which would be of great advantage to the plaintiffs as owners of the granted premises and with respect to which they would have valuable easements, the City has constructed piers for the exclusive use of itself and its lessees as proprietors. Thus the plaintiffs are shut out entirely from all the privileges of their grants.

In the light of this determination, it seems almost ironical to say, as was conclusively established by the decision and judgment finally affirmed, that the grantees "acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds with the right to fill in and improve the same at their pleasure, subject to the Federal Government's power to control," and that "the grants constituted valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation" (*Record*, No. 15, p. 550).

We submit that the plaintiffs are entitled to the full enjoyment of their premises so far as it can be had consistent with the Secretary of War's action.

Fourth. With respect to the requirement of permission by the City for the making of the plaintiffs' improvements, this Court will determine for itself the true construction of the grants.

It is a well settled rule that when a case arises under the contract clause of the Federal Constitution, the Court will determine for itself, independent of the judgment of the State Court, (a) whether there is a contract,

(b) whether the subsequent legislation does impair its validity, and (c) whether the State Court has given effect to that legislation.

> "The question of the existence or non-existence of a contract in cases like the present is one which this Court will determine for itself, the established rule being that where the judgment of the highest court of a state by its terms or necessary operation gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this Court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligations" (*Mobile & Ohio R. R. Co. v. Tennessee*, 153 U. S. 486, 492, 493).

See also:

Jefferson Branch Bank v. *Skelly*, 1 Black 436, 443;

University v. *People*, 99 U. S. 309, 321;

McCullough v. *Virginia*, 172 U. S. 102, 116, 117;

Houston & Texas Central R. R. Co. v. *Texas*, 177 U. S. 66, 77, 78;

Hubert v. *New Orleans*, 215 U. S. 170, 175;

Cross Lake Club v. *Louisiana*, 224 U. S. 632, 638, 639;

Carondelet Canal Co. v. *Louisiana*, 233 U. S. 362, 376-378;

Louisiana Railway & Navigation Co. v. *New Orleans*, 235 U. S. 164, 170, 171;

Columbia Railway Co. v. *South Carolina*, 261 U. S. 236, 245-247.

There is no inconsistency in the application of this familiar principle and the recourse to the local law with respect to title to the soil under navigable waters within the territorial limits of States and the extent of riparian rights. The State has no privilege, in the case of grants of lands under water, any more than in any other case, to impair the obligation of contracts. The constitutional protection extends to such grants as well as to other contracts. The reference to local law with respect to general questions of title, riparian rights, etc., is always, as this Court has said, "subject to the condition that their rules" (that is, the rules of the State) "do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

Packer v. *Bird*, 137 U. S. 661, 669.

In the present case there is no open question as to the title of the State, of the City, or of the plaintiffs holdings grants from the City. The judgment between these parties as we have seen covers all these points;—the title of the State and its competency to grant; the title of the City and its authority to make the grants, and the effect of the grants as absolute conveyances in fee simple of the property in question.

When the question is presented, therefore, with respect to the construction of the grants, and it appears that there is an attempt to "impair their efficacy" and to deny the right to the use and enjoyment of the property by the grantees, by virtue of subsequent legislation, it is the privilege and duty of this Court to construe the grants for itself in order to determine whether their obligations are impaired.

The question of the construction of the plaintiffs' grants with respect to the requirement of permission by the City for the making of improvements on the premises granted is a question of this sort, for, by withholding permission, the City is endeavoring to give effect to subsequent legislation which if sustained would impair the obligation of the contracts. It is in this view that the contention as to the permission of the City will be considered.

Fifth. The true construction of the grants is that the plaintiffs are entitled to improve the granted premises in accordance with the terms of the grants at their pleasure and without the consent of the City of New York. At most, the City could insist upon a reasonable police supervision.

In the Decision and Judgment in No. 15, defining the rights of the plaintiffs under their grants, there was nothing which gave the slightest color to the contention that the plaintiffs could not improve the granted premises within the bulkhead line according to the terms of the grant without the City's permission or that they were bound to seek the City's permission. On the contrary, it was distinctly held that the plaintiffs could improve their premises in accordance with the terms of the grants at their pleasure and without the consent of the City of New York, so far as the improvements within the bulkhead line were concerned. Thus, in the additional conclusion of law incorporated in the decision by the order and judgment of the Appellate Division, which was finally affirmed, it was provided as follows:

> "28. The plaintiffs have the right to fill in and make dry land *at their pleasure, and without*

the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890." (Italics ours.) (*Record*, No. 15, p. 550.)

The question of the permission of the City, so far as the right to fill in up to the bulkhead line was concerned, was brought up in the *mandamus* proceeding in No. 16. It should be observed that this proceeding was instituted in 1920 after the judgment had been entered on the decision of the trial Court in No. 15. The rights of the plaintiffs to a certain extent had been sustained by that judgment and it was the understanding, we believe, of both parties, that under that judgment, even without the precise and additional conclusions set forth later by the Appellate Division, the plaintiffs were entitled to fill in up to the bulkhead line. They had been compelled, as we have seen, to pay large taxes upon the property. In this situation, they decided upon making improvements and they filed their application with the Department of Docks for the usual permit. This was simply in recognition of the police power of the City, for in all municipalities no one can move a step in connection with any improvement without a permit, which does not imply a lack of the rights of ownership, but simply a recognition of the necessary police control of building operations within the City's limits. Such operations must be conducted with due regard to reasonable regulations to promote safety and respect for rights of other property owners, etc. But the authority that the municipality has with respect to such permits does not extend to the overriding of property rights and the refusal to permit

the exercise of these rights consistently with reasonable police regulations.

When the application was thus made by the plaintiffs in 1920, the City resisted. It pleaded, as has been shown, simply that the Department of Docks with the approval of the Commissioners of the Sinking Fund had made a "new plan" moving the bulkhead line 100 feet inshore of the Secretary of War's bulkhead line, that is, purporting to cut off 100 feet of the premises which admittedly the plaintiffs were entitled to improve. There was no criticism of, or objection to, plaintiffs' plans for improving the property with reference to their reasonableness or to the application of police regulations. It was simply answered that these plans of improvement were inconsistent with the City's new plan of moving back the bulkhead line, and that therefore the Department of Docks was without authority to grant the application.

Upon the hearing of the petition for *mandamus* to enforce the plaintiffs' property rights, when there was no other question before the Court upon the pleadings, except the adoption of the new plan in derogation of these rights, it was said by the Court of first instance that the grant was made upon condition that permission should be obtained before structures could be erected.

Appeal was then taken to the Appellate Division and there the order denying the *mandamus* was reversed upon the ground that there was no objection to the plaintiffs' plans, that they were entitled to improve their property and that the *mandamus* should be granted with the sole reservation of the opportunity to the City to acquire the property by condemnation if they took such a proceeding within a stated time. This was entirely consistent with the determination of the Appellate Divi-

sion which they made at the same time in modifying, and affirming as modified, the judgment in No. 15.

But the Court of Appeals affirmed the decision of the Appellate Division in No. 15 and reversed its decision in No. 16, stating in its opinion that permission of the City was necessary before any improvement could be made.

Now, coming to this question of permission, and of the true construction of the grants in this respect, it will be observed that the question has two phases. The one is with respect to the terms of the grants themselves; the other is in relation to a provision of a City ordinance of 1844. So far as the terms of the grants themselves are concerned, the Court of Appeals made the following statement in its opinion (*Record*, No. 16, pp. 78-79, *Matter of Appleby* v. *Delaney*, 235 N. Y. 364, pp. 366-367):

> "The water grants under which relators hold title also provide:
>
> 'And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without

the permission of the said parties of the first part or their successors or assigns first had for that purpose.'

In *Duryea* v. *Mayor, etc.* (62 N. Y. 592), it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (*Duryea* v. *Mayor, etc.*, 96 N. Y. 477), it was said that the provisions of the sinking fund ordinance had not been called to the court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission."

To this statement, it may be answered, that, if the sinking fund ordinance was not before the Court in *Duryea* v. *Mayor*, 62 N. Y. 592, the *provisions of the water grants*, identical with the provisions above mentioned and quoted by the Court of Appeals were before the Court in *Duryea* v. *Mayor*, and it was held specifically that this covenant not to build the wharves, bulkheads, avenues or streets, or to make the lands in conformity with the covenants mentioned, only applied to the portion of the premises described which were within the

streets and avenues, and thus excepted from the grants, and did not apply to the premises granted. The Court in *Duryea* v. *Mayor*, *supra*, said (*id.*, pp. 596, 597), the covenant being the same as that here in question (*id.*, p. 593):

> "There is certainly no express prohibition or covenant against filling in the intermediate spaces between the shore line and the line of the streets, avenues, wharves, etc. The deed conveys nine several pieces of land under water by metes and bounds, adjoining certain contemplated streets running to the East River. The spaces to be occupied by streets are not conveyed. It contains covenants that the grantee shall, within three months after being required, make and construct the streets and wharves and bulkheads referred to, 'and will also fill in the same with good and sufficient earth, and regulate and pave the same and lay the sidewalks thereof.' It also contains a covenant that the grantee will not build the streets, wharves, etc. 'or make the lands in conformity with the covenants hereinafter' mentioned, until permission shall be obtained from the city. The only covenant in the deed for *making* lands applies exclusively to the building of streets, wharves, etc., and there is not a word pertaining to the intermediate spaces. * * * The estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an absolute owner except as restricted by the covenants and reservations contained in it. The beneficial enjoyment of property belongs to the ownership and the construction contended for would deprive the plaintiff of any such enjoyment, until the city ordered the streets

> and other structures to be made. It is a general rule that exceptions and restrictions are to be construed strictly against the grantor and are not to be extended beyond the fair import of the language expressed except by necessary implication. No such implication arises in this case."

In the opinion of the Court of Appeals in No. 16, above quoted, reference is made to *Duryea* v. *Mayor*, 96 N. Y. 477, but in that case the Court manifestly adhered to the construction of the covenants in the grants, as distinguished from the ordinance (*id.*, p. 488), and apparently thought that the construction given to the covenants could also be applied to the ordinance if it had appeared that the City had not given its consent (*id.*, p. 494).

The Court said (*id.*, p. 496):

> "It is quite inconceivable that parties should purchase land burdened with the condition that it should be enjoyed only by the permission of the grantor, and a construction having that effect should only be adopted when no other is possible or sustainable."

The rule, that the covenants quoted in the opinion of the Court of Appeals did not apply to the granted premises, but only to the portions of land within the streets and avenues, as decided in *Duryea* v. *Mayor*, 62 N. Y. 592, has been a rule of property in the State of New York which has been applied by the Courts and upon which owners have relied for many years. Thus in *Mayor* v. *Law*, 125 N. Y. 380, 391, it was said that the grantee under a grant of this sort "could fill up whenever

he chose, suiting his own pleasure as to the time and manner of doing it."

But the extraordinary thing is that the Court of Appeals should have referred to these covenants in the grants, in relation to the question of the necessity of obtaining the City's permission to fill in the premises granted, when at the same time the Court of Appeals was affirming the determination of the Appellate Division in No. 15 and had passed upon that very question and had explicitly held that the permission of the City under these particular covenants was not required. For this question was the subject of conclusions of law contained in the Decision upon which the judgment appealed from was entered, and the conclusions of law in this respect were affirmed by the Appellate Division and by the Court of Appeals without modification. These conclusions are as follows (*Record*, No. 15, Decision, pp. 197, 198):

> "(14) VII. The covenant by the grantee, that he, his heirs and assigns
>
> 'will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,'
>
> relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.
>
> (15) VIII. The covenant by the grantee, that he, his heirs and assigns

> 'will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose,'
>
> refers only to the lands under water in front of the plaintiffs' premises and there is no such covenant as to the granted premises between the streets and avenues."

Thus we have not only the rule of property established by repeated decisions of the Court of Appeals upon this precise question but a final determination of the question, so far as the State court was concerned, as between these plaintiffs and the City of New York.

So also the Ordinance of 1844 cannot be invoked as against the plaintiffs' grants by any true construction thereof. There is ample room for the contention that this ordinance should be construed in the same way as the covenants in the grants, as was intimated by the Court of Appeals in *Duryea* v. *Mayor*, 96 N. Y. 494. To say that the City received thousands of dollars, as it did in this case, for grants of property of this sort to be filled in and enjoyed at the grantees' expense, and reserved an arbitrary right to refuse to the grantees any opportunity to make the improvement is absurd. Such a construction of the ordinance is repugnant to the grants themselves and the grants properly construed contain no such condition. But the State court has construed these very grants in the light of everything applicable to that construction by its final determination

in No. 15, and has there held upon the precise point "that the plaintiffs have the right to fill in and make dry land at their pleasure and without the consent of the City of New York of so much of their said premises as lie between the westerly side of Twelfth Avenue and the bulkhead line established by the Secretary of War in 1890" (*Record*, No. 15, Sec. 28, p. 550).

The question then is whether, in the light of this proper construction of the grants, which is reached not by argumentation simply but by the actual determination of the questions between these parties through the judgment in No. 15, the State has been permitted by giving effect to its subsequent legislation to impair the obligation of the grants and thus also deprive the plaintiffs of their rights of property without due process of law.

Sixth. The adoption of the new plans of 1871 and 1916 by the Department of Docks with the approval of the Commissioners of the Sinking Fund, under the provisions of the Act of 1871 and the Greater New York Charter, was legislative action within the meaning of the contract clause of the Federal Constitution.

As stated by the Appellate Division in its additional Conclusion 32 in No. 15 (*Record*, No. 15, p. 550), Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of any other pier, and by Chapter 574 of the Laws of 1871 the City of New York was authorized to adopt a plan for the waterfront, including the erection of piers, and by the adoption of pier plans under this statute the plaintiffs have been prevented from erecting any pier or wharf or other structure upon their premises.

Again, it appeared that under the provisions of the Greater New York Charter, carrying forward and amending the Act of 1871 and authorizing the adoption of a plan for the waterfront by the Department of Docks with the approval of the Commissioners of the Sinking Fund, a new plan was made in 1916 moving the bulkhead line inshore 100 feet and this, as has been said, was the answer made by the Department of Docks to plaintiffs' application for a permit for the improvement of their property and the sole answer made by the City in its pleading to the petition for a *mandamus* in No. 16.

Now, it is evident that the Acts of 1857 and of 1871 and the provisions of the Greater New York Charter were all acts of the Legislature of the State of New York. But this action was not complete. It authorized further legislative action which would give the exact rules to be applied through the adoption by the City's department of plans for waterfront improvement. When these plans were adopted by the Department of Docks with the approval of the Commissioners of the Sinking Fund they became effective by virtue of the authority of the Legislature. These plans and their adoption by the authorized department of the City constituted new rules of action for all persons concerned. Thus they established rules of action with respect to the building of piers and structures; there was in the new plan of 1916 another rule of action established with respect to the building of bulkheads. The Legislature, in its authorizing acts, provided in advance the sanction for these rules of action by prohibiting all persons from doing any acts in violation thereof and by assigning penalties for such violation. The moment the Department of Docks acted with the

approval of the Commissioners of the Sinking Fund with respect to the pier plan, which prevents the plaintiffs from building any piers or structures, and with respect to the bulkhead line, which moved the bulkhead line inshore 100 feet of the Secretary of War's bulkhead line, its rules became binding upon all persons with the complete effect of legislative action. What should be done, and what was prohibited, was thus defined by the City acting under authority of the State.

It has frequently been held that where a municipality acts under authority of the State, in laying down rules by by-laws or ordinances, those by-laws or ordinances are considered as *laws* within the meaning of the provision of the Federal Constitution against the passing of laws impairing the obligation of contracts.

> "So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by a legislature to a corporation as a political subdivision of the State having all the force of law within the limits of the municipality that it may properly be considered as a law within the meaning of the article of the Constitution of the United States."
>
> *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18.

The point is, as stated in *Williams* v. *Bruffy*, 96 U. S. 176, 183, that "any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause" in question.

See also

Walla Walla City v. *Walla Walla Water Works Co.*, 172 U. S. 1;
Mercantile Trust & Deposit Co. v. *Columbus*, 203 U. S. 311;
Zucht v. *King*, 260 U. S. 174.

The plans adopted by the City under the Acts of 1871, and the Greater New York Charter, have the force of laws, being as clearly *laws* in the strictest sense as though they had been passed directly by the Legislature limiting the action of the plaintiffs. The State has thus exerted its legislative authority defining what the plaintiffs may do or not do with this property.

Seventh. The State Court in the *mandamus* proceeding (No. 16) gave effect to this action impairing the obligation of the plaintiffs' grants.

We have already noted how the Court in No. 15 gave effect to the action adopting the pier plan so as to prevent the plaintiffs from improving their property in any way beyond the bulkhead line. In No. 16, by denying the *mandamus* prayed for, the Court gave effect to the new plan moving the bulkhead line inshore. In determining whether effect is given to legislation impairing the obligation of a contract, the Court looks to the substance of things, construing the grant and determining whether in reality the obligation has been impaired. What has happened in this case? Under a true construction of the grants, under the final determination of the State Court with respect to that true construction,

the plaintiffs had a right to fill in their property up to the bulkhead line. The State Court, in No. 15, held that the action of the Commissioner of Docks in establishing the new bulkhead line in 1916 could not impair or destroy the property and rights of the plaintiffs (*Record*, No. 15, p. 550). But if this were so, the plaintiffs were entitled to make their improvements and the City had no right to interfere with them, except to the extent of reasonable police regulations relating to the execution of the work. When the plaintiffs asked for the appropriate permit to go on with the work, which they were entitled to execute, the City refused, simply setting up its new plan, that is, asserting the legislative action taken by the City under the authority of the State Legislature in defining a line to which attached the prohibition of the State that no one should build beyond it. This, as the Appellate Division pointed out, was the only objection; this was the only pleading presented. The State Court, by denying the *mandamus*, necessarily gave effect to the new plan by sustaining the position of the City in denying permission to do anything inconsistent with the new plan. Thus, the plaintiffs have been deprived of the benefits of their grants entirely. The City has taken the property granted for the use of other grantees *sub modo*, that is, lessees. It has appropriated the property of the plaintiffs to the use of these lessees as proprietors, and standing upon its new plan, which is in derogation of these grants and which the State had no right under the Federal Constitution to establish, defies the plaintiffs by refusing them permission to proceed. The State Court has sustained this position of the City and the City thus stands entrenched in its new plan.

Eighth. The plaintiffs are entitled to judgment protecting their grants and property rights.

The plaintiffs are entitled to build out to the bulkhead line. The plan for improvements they submitted was in conformity to their rights and there was no objection by the City, as we have said, except upon the basis of the new plan. Accordingly, the order of the Appellate Division was correct to the effect that the *mandamus* should have been granted with opportunity to the City to acquire the rights of property through condemnation proceedings and payment of just compensation. This relates to the relief desired in No. 16.

With respect to No. 15, plaintiffs are entitled to a protection of their rights under the grants not only up to the bulkhead line fixed by the Secretary of War, but from the bulkhead line out to the pierhead line so far as action by the plaintiffs consistent with the Secretary of War's pierhead line may be had. The conclusion of law 32 in the determination of the Appellate Division, affirmed by the Court of Appeals (p. 550) should be set aside and it should be held that the State government had no right by its subsequent legislation to adopt plans which would prevent the plaintiffs from erecting any pier or other structure upon their premises between the bulkhead line and the pierhead line established by the Secretary of War, provided that such piers or structures were not opposed to the Secretary of War's regulation.

Again, the plaintiffs are entitled to an injunction adequately protecting their property rights by preventing the acts of ownership which the City, its representatives and lessees, are committing in respect to and over the granted

premises. The City having built piers within the street lines for the exclusive use of its lessees, having shedded them and built fences and gates, has assumed proprietorship with respect to these piers over the plaintiffs' property in what are called the basins and slips adjoining. These are used as completely as though the City owned them. Vessels are brought in over the plaintiffs' premises to moor at the adjoining exclusive piers. The plaintiffs have the land under the water; the injunction granted in No. 15 (p. 202) compelled the City to take down and remove the overhanging dumping board or platform on the northerly side of the pier in West Thirty-ninth Street; and yet while the title of the plaintiffs in the soil under the water is recognized, and the plaintiffs' right above the water is recognized, the lessees of the piers are permitted to enjoy the plaintiffs property between the two as though the lessees owned it themselves. If the premise is correct, as found by the State court in No. 15, that the City granted upon due authorization the absolute title in fee simple to these premises, then the plaintiffs are entitled to prevent acts of ownership over the premises to which they have this title. It should be observed that, as the undisputed evidence shows, the lessees of the piers enjoy the privilege of having vessels moored alongside for docking, unloading, etc., even in shore of the bulkhead line of the Secretary of War.

The question as to such use of the premises in connection with the piers leased by the City is not at all a question of the regulation of public navigation. The Courts below seem to have thought that, so long as there was water there, the City could do as it pleased. But the point is that the City has not established regulations in the interests of navigation in the sense of preserving

public opportunities of navigation with reference to safety and by other reasonable regulations. What the City is doing is appropriating these premises to the proprietary use of itself and its lessees. There is no more public use in its lessees maintaining a wharf than in these plaintiffs maintaining a wharf. There is no more public use in its lessees having a place for vessels to dock by going over the plaintiffs' premises than if the plaintiffs had the privilege of having vessels dock at the plaintiffs' bulkheads and wharves. The City, instead of treating the premises as open to the public, is confining their use to those who have made contracts with it for substantial rentals and is thus taking to itself the profits of plaintiffs' premises as a proprietor in defiance of its grants. It is submitted that the plaintiffs are entitled to an injunction restraining the City, its representatives and lessees; from using in any way the plaintiffs' premises as slips or basins in connection with the City's piers built and maintained as stated.

The plaintiffs not only had the grants of the land under water, but they had easements of light, air and access in the streets and avenues shown on the maps annexed to their grants (*Record*, No. 15, Decision, p. 196). These streets and avenues were to be public streets and avenues for the common use of the inhabitants of the City. The plaintiffs having the adjacent property under their grants would thus enjoy valuable rights in the streets and avenues open to the public. But, instead of recognizing and safeguarding these easements, the City seeks to destroy them. Instead of making and opening streets and avenues for public use it has made exclusive pier sheds and prevented any physical access by the plaintiffs to them. Thus the plaintiffs' property is used

for the benefit of the City's lessees and the plaintiffs are not allowed the enjoyment of their easements in the streets which are occupied by the City's lessees' piers. Plaintiffs, it is submitted, are entitled to an injunction restraining the City from interfering with these easements in the streets and avenues shown on the maps annexed to their grants.

Further, the plaintiffs were entitled to all manner of wharfage, cranage, advantages and emoluments accruing or growing from that part of the exterior line of the said City lying on the westerly side of the premises granted (*id.*, pp. 374, 385). There was excepted the wharfage, cranage, advantages and emoluments to grow and accrue from the westerly end of the bulkhead in front of 39th, 40th and 41st Streets, but there was granted to the plaintiffs what would accrue at the westerly end of the bulkhead between the streets. The Secretary of War's bulkhead line is in-shore of the exterior line defined in the grants, but there is still a westerly line of the granted premises and there is still opportunity, as the Secretary of War's pierhead line is far beyond the limits of the plaintiffs' grants, to pier out to the place at which the plaintiffs were to derive every manner of wharfage, cranage or other advantages or emoluments. But this right has been taken away without compensation. It is manifest that the plaintiffs are entitled to an injunction against any use of the property in question which would deprive them of this right.

There is nothing unreasonable or inequitable in such a protection of the plaintiffs' rights of property. The plaintiffs' predecessors in title paid for them; the plaintiffs are paying taxes upon the assumption that they own them. All that is necessary for the City to do in

order to carry out its new plan and to escape the restrictions of the injunction to which the plaintiffs are entitled, is to condemn the property and pay for it. There is nothing but justice in that. The Act of 1871 contemplated that they would do this. The City started its condemnation proceedings with respect to the *locus in quo* in 1894, and then after many years the proceedings were discontinued. The idea seems to prevail that they can take the plaintiffs' property without paying for it. The plaintiffs ask that their rights be recognized; and, if the City does not wish to acquire the property and pay for it, that the plaintiffs be permitted to improve it according to the terms of their grants and consistently with the exercise of Federal authority.

Respectfully submitted,

CHARLES E. HUGHES,
BANTON MOORE,
Of Counsel for Plaintiffs-in-Error.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors, etc.,

Plaintiffs-in-Error,

against

THE CITY OF NEW YORK, *et al.*,

Defendants-in-Error.

MEMORANDUM OF PLAINTIFFS-IN-ERROR IN REPLY.

On examining the brief for the defendants-in-error, we find no reason to modify or add to the arguments made in our principal brief, but we desire to refer briefly to some of the cases cited by counsel for the defendants-in-error which we think do not warrant the construction which he puts upon them.

In *Montgomery* v. *Portland*, 190 U. S. 89, there was no grant involved, but it was contended by a riparian owner that the Act of Congress of 1890 deprived the local authorities of all power in respect to the building of structures in the river (p. 104).

In *Greenleaf Lumber Company* v. *Garrison*, 237 U. S. 251, there was no question of any State grant but merely of the paramount right of Congress to fix a line.

Obviously, the statements in the opinions in the *Ice Company* cases in New York must be taken in relation to

the questions involved in those cases and cannot be regarded as overriding the rules established by a long line of authorities with respect to grants in fee simple.

Thus, in *Knickerbocker Ice Company* v. *Forty-second Street R. R. Company*, 176 N. Y. 408, the question was of a grant of a pier at the foot of Forty-third Street (p. 415). The grantee had actual knowledge of the covenants with respect to Forty-third Street which were contained in deeds to the adjoining property and he knew the public trusts upon which Forty-third Street was held by the City. The Court held that the grant in question was not one of a fee, but of a right to maintain a pier (p. 418). As to this, it was held that the plaintiff "had the right to follow the lawful extension of Forty-third Street for the purpose of maintaining a pier and collecting its revenues" (p. 419). The case did not involve the title to the lands adjacent to Forty-third Street, and there is nothing in the decision which detracts from the authorities that grants of land under water such as those here involved convey the absolute fee.

Further, in the subsequent case of *Matter of Mayor*, 193 N. Y. 503, where the same pier grant was involved as that in the case of the *Knickerbocker Ice Company, supra*, the Court held that the grant of "the right to maintain a pier and to collect wharfage, etc., at the foot of Forty-third Street" was a valid grant (p. 518), and that "that right cannot be destroyed without compensation" (p. 519). The Court said: "While the City clearly has the power to acquire this right or franchise owned by the ice company, the latter is quite as clearly entitled to compensation for being deprived of that right" (p. 520). But it held that it could not obtain the compensation in that proceeding. The same pier right in Forty-third Street was involved in the case of the *American Ice Company* v. *The City of New York*, 217 N. Y. 402, cited by counsel for defendants-in-error (the American Ice Company being the successor of

the Knickerbocker Ice Company), and the Court referred to its former holding that the plaintiff was "entitled to proper compensation for the taking of his right to maintain a pier" (p. 416), and said further: "We reiterate that the deed from the City to Lindsley conveyed to Lindsley the right to maintain a pier and to collect wharfage at the foot of Forty-third Street wherever that point should be located by the lawful authority, and that the plaintiff as successor to Lindsley had the right to follow the lawful extension of said pier on Forty-third Street for the purpose of maintaining the pier and collecting revenues therefrom" (p. 417). Thus, the Court re-affirmed the right of compensation (pp. 420, 421), and instead of the *Ice Company* cases constituting authority for the proposition that the benefit of the grants by the City may be taken away without compensation, they establish just the contrary and award compensation to the grantee for what was only a pier right in a street. None of the general remarks in the opinions detract from the force of this decision.

Another case cited by counsel for defendants-in-error is *Cox* v. *The State*, 144 N. Y. 396. The grant relied upon was in that case held in express terms to be in violation of the State Constitution, whereas grants of the sort made to the plaintiffs-in-error in the case at bar have been repeatedly held to be in accordance with the Constitution of the State.

In *People* v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, the grant was made pursuant to the Act of 1813, which gave a naked title to the soil without any right to disturb the waters. There was no grant such as that authorized by the Act of 1837 extending the *ripa*, to make land, fill in and improve. The grant did not constitute an extinguishment of the *jus publicum*. In other words, the grant was entirely different in its scope and effect from what the grants of the plaintiffs-in-error have been held to be. There was nothing in that case which qualified the decision in *Duryea* v. *Mayor*, 62 N. Y. 592, decided a short time before by the

same Court composed of the same judges, who unanimously held that in the case of a grant like those here in question "the estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an absolute owner except as restricted by the covenants and reservations contained in it." This is the principle applicable here, sustained by the long line of cases to which we have referred in our principal brief.

In *Coffin* v. *Scott*, 19 Weekly Digest, 413, printed in the appendix to the brief of defendants-in-error, the question related to a pier at the foot of West Forty-fourth Street on land which was expressly excepted from the grant. As the Court said, "the pier is wholly built within the lines of the street and upon the land excepted from the grant" and "the plaintiff has no title or interest therein which entitles him to claim the ownership of such pier or to demand wharfage or rent for its use." While the plaintiff could not demand such wharfage on the pier within the lines of the street which was excepted from his grant, there was no question involved or denial of his right to fill in or to have piers or structures built by him under his grant within the limits of the property granted. In the present case, the plaintiffs-in-error are not seeking to get wharfage on the piers within the lines of the street, but to have the right to use their own property according to the terms of the grants and not in conflict with Federal authority, in order they might obtain the benefit of its use as agreed.

And to repeat, if there could be any possible doubt upon this point, it is resolved by the conclusions in the Decision and Judgment in this case explicitly setting forth the quality of the plaintiffs' title.

Respectfully submitted,

CHARLES E. HUGHES,
BANTON MOORE,
Counsel for Plaintiffs-in-Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors, etc.,
Plaintiffs-in-Error,
against
THE CITY OF NEW YORK, *et al.*,
Defendants-in-Error.

No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs-in-Error,
against
JOHN H. DELANEY, as Commissioner of Docks of The City of New York,
Defendants-in-Error.

In Error to the Supreme Court of the State of New York.
(235 N. Y. 351, 364; 199 App. Div. 539, 552.)

BRIEF FOR PLAINTIFFS-IN-ERROR ON REARGUMENT.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

(235 N. Y. 351, 364; 199 App. Div. 539, 552.)

BRIEF FOR PLAINTIFFS-IN-ERROR ON REARGUMENT.

We shall not attempt to repeat the statement of facts or to re-traverse all the ground covered in our principal brief, but rather to seek to give appropriate emphasis to the points we believe to be controlling.

Summary Statement.

The plaintiffs claim under grants from the City of New York of water lots on the Hudson River between 39th and 41st Streets and 12th and 13th Avenues. These grants, made in 1852 and 1853, conveyed the fee simple to the plaintiffs' predecessors in title. The land within the defined limits of 39th, 40th and 41st Streets, respectively, and within the limits of 12th and 13th Avenues, respectively, was retained by the City. By the terms of the grants, these streets and avenues were to be and remain public streets and avenues for free and common use (*Record*, No. 15, Ex. 4, p. 372, fol. 1114; Ex. 5, pp. 382, 383, fols. 1146-1147). Within the boundaries of the grant and outside the limits of the streets and avenues, the plaintiffs are the owners of the premises and are entitled to improve them. The plaintiffs under their grants are also entitled to the "wharfage, cranage, advantages or emoluments" accruing by or from that part of the exterior line of the City as defined lying on the westerly side of the granted premises, for their "own proper use and benefit forever" (*id.*, p. 374, fols. 1121, 1122; p. 385, fol. 1154).

Overriding the plaintiffs' rights, the City adopted different plans. The City built piers (which were extended streets) within the limits of 39th, 40th and 41st Streets; but instead of making these public streets or piers, the City leased them as proprietor for the exclusive use of their lessees. The City and its lessees treated the intervening spaces between the piers as appurtenant to the piers and made them basins or slips for the use of the piers. The City and its lessees treated these intervening spaces, although they were part of the granted premises, as their own and

the City dredged them out to facilitate their use for the benefit of the City and its lessees.

Meanwhile, the plaintiffs were heavily taxed for the property they could not enjoy and they have paid their taxes (*id.*, p. 200). The Federal bulkhead line of 1890 ran across their property, but so far as the Federal Government was concerned, the plaintiffs could still make solid filling inshore of this bulkhead line. Outside this line of solid filling, the plaintiffs, so far as the Federal Government was concerned, could still build open piled structures out to the line of their property, as the Secretary of War's pierhead line was far out beyond the westerly boundary of the plaintiffs' grants (*id.*, Finding 33, p. 182, fol. 544; Principal Brief for Plaintiffs in Error, pp. 60, 61; Original of Ex. C, p. 529, submitted on argument). But the City would not permit the plaintiffs either to fill in inshore of the bulkhead line of the Secretary of War or to pier out or build any sort of structure beyond that line and within the Secretary of War's pierhead line.

In preventing the plaintiffs from using their property, the City acted under the authority of legislation of the State subsequent to the grants, *i. e.*, under Chapter 763 of the Laws of 1857 and Chapter 574 of the Laws of 1871 and the provisions carried into the Greater New York Charter and its subsequent amendments. The Act of 1871 contemplated that the City in carrying out plans derogating from these grants of the water front property should re-acquire the title to such property by appropriate condemnation proceedings. It provided explicitly for such proceedings (Laws of 1871, Chap. 574, Sec. 4). Accordingly, in 1894, the City began condemnation proceedings to acquire the premises in question and commissioners were

appointed for that purpose (*Record*, No. 15, Findings 22-24, pp. 179, 180; Exs. 12a-15, pp. 397-417). Under cover of these proceedings, and while plaintiffs were debarred from improving their property (as they could not seek to increase the award in this way) the City proceeded to treat the premises as their own to be used beneficially for itself and its lessees and this situation continued until 1914 when the condemnation proceedings were discontinued by the City (*id.*)

Thereupon, in September, 1914, the suit of *Appleby* v. *The City of New York*, No. 15, was brought (*id.*, p. 8, fol. 24). This was a suit to procure a judgment establishing the title of the plaintiffs to the granted premises and to restrain the illegal encroachments of the City and its lessees. The State Court, whose judgment is under review, sustained the plaintiffs' title as a title in fee simple. The Court definitively determined that the City could not as the successor to the title of the State convey lands to private owners and retake the same by the exercise of the police power without making compensation therefor (*id.*, p. 568). The plan could not be carried out without reacquiring the title which it (the State) has authorized the City to convey to private owners (*id.*, p. 569).

But the State Court, in No. 15, drew a distinction between the portion of the premises inshore of the Secretary of War's bulkhead line and the portion beyond that line. The plaintiffs have no quarrel with this so far as this bulkhead line is made the limit of solid filling. But as to the portion of the premises beyond that line of solid filling, the State Court was not content to maintain the Federal pierhead line which was beyond plaintiffs' westerly boundary. The State Court proceeded to give effect

to Chapter 763 of the Laws of 1857 and Chapter 574 of the Laws of 1871 as amended, and held that the plaintiffs could not erect "any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue", that is, between the said bulkhead line and the westerly boundary of plaintiffs' grants although this boundary was far inside of the Federal pier headline (*Record,* No. 15, pp. 550, 551).

We seek a review and reversal of this determination of the State Court upon the ground that the legislatiou thus made effective impaired the plaintiffs' contracts and deprived them of their property without due process of law, contrary to the Federal Constitution. The Federal questions were properly raised (*id.*, pp. 146-150), were litigated and determined. The judgment evidently proceeded upon a wrong construction of the action of the Secretary of War in establishing the Federal pierhead line. That action did not prevent open piled structures being built between the Federal bulkhead line and the Federal pierhead line. As to this measure of enjoyment of their premises the plaintiffs were not affected by the Federal action, and the State, and the City acting under its authority, were in this respect no more entitled to interfere with the plaintiffs' title and rights under the grants between the bulkhead line and the westerly boundary of the granted premises, than they were entitled to interfere with the plaintiffs' title and rights inshore of the bulkhead line.

In 1916, and while the suit No. 15 was pending, the City authorities adopted another plan under which the bulkhead line, or line of solid filling, was to be pulled further inshore. The plaintiffs having obtained a decision in No. 15 from

the court of first instance which measurably sustained the plaintiffs' title and property rights, sought to improve their property inshore the bulkhead line of the Secretary of War and applied for the usual permit from the municipal authorities, which is necessary in the case of practically all property within the City limits in order that suitable police regulations may be enforced. Their application was denied upon the ground that the municipal authorities had no power to grant it in view of the new plan of 1916. The plaintiffs then brought their proceeding for a *mandamus*. This proceeding is No. 16, *Appleby* v. *Delaney*. The *mandamus* was denied.

This determination gave effect to the City's plan of 1916, and the legislation under which it was adopted. We complain of that legislative deprivation of the plaintiffs' property rights and the impairment of the obligations of their grants. The Federal question was properly raised (*Record*, No. 16, pp. 10-11). The invocation of the municipal ordinance of 1844, requiring the permission of the City to fill in, cannot aid the City. It is for this court to construe the grants, when impairment of the contractual obligation is alleged, and we urge that the proper construction of the grants with reference to the ordinance does not give the arbitrary power to the City, for which it contends. The State Court is not at liberty to sustain subsequent legislation impairing grants by giving a forced and erroneous construction so as to permit the legislation to be effective. Otherwise, the State could make short work of the constitutional guarantee.

It should be observed that the City based its refusal to give the permit for the filling in inshore of the Federal

bulkhead line solely on the ground that under legislative authority it had adopted the new plan of 1916 making a new bulkhead line further inshore (*id.*, p. 35). This was the only defense presented in the City's answer in the *mandamus* proceeding (*id.*, p. 65).

The result is that the plaintiffs are wholly debarred from the enjoyment of the premises under their grants. Counsel for the City admits before this Court that his contention is that "the plaintiffs have merely a naked fee with respect to the lands in question. They may not devote them to any profitable use." (Former Brief for City of New York, p. 19). Apparently the only privilege vouchsafed to the plaintiffs is that of paying taxes. Manifestly this is not the intent or effect of the grants. We challenge the City's position as a bald assertion of a right in the State to destroy the obligation of the grants and to deprive the plaintiffs of their property without compensation.

Outline of Argument.

Considering our principal brief as sufficiently presenting the facts, we shall discuss at this time the following questions, developing the points which have been briefly suggested in the above statement:

(1) With respect to No. 15, *Appleby* v. *City of New York*:

(a) What was determined by the State Court?

(b) The Federal question presented.

(c) The effect of the Secretary of War's pierhead line and the rights of the plaintiffs under their grants with respect to the portion of the premises between the Secretary of War's bulkhead line and his pierhead line.

(2) With respect to No. 16, *Appleby* v. *Delaney*:

(a) What was determined by the State Court?

(b) The Federal question.

(c) The true construction of the grants in the light of the ordinance invoked by the City.

(d) The effect given by the State Court to the legislation impairing plaintiffs' grants.

ARGUMENT.

No. 15—Appleby v. City of New York.

First. What was determined by the State Court?

The plaintiffs' title, its quality, and the extent of the plaintiffs' rights were litigated and determined. The plaintiffs had no adequate remedy at law. They resorted to equity to restrain the illegal action of the City and its lessees, but their right to relief depended upon the establishment of their title and the nature and extent of their rights by virtue of their grants. Accordingly, in their complaint, they set forth their grants, their right to fill in the premises and make land, their right of wharfage, cranage and dockage, the various acts of the State legislature, the abortive condemnation proceedings, the attempts by the City to subject the plaintiffs' premises to the beneficial use of the City, and its lessees, as proprietors, contrary to the plaintiffs' rights of property, and the illegal encroachments of the City and its lessees. They asked for relief restraining these interferences. (*Record*, No. 15, Complaint, pp. 9-61.)

The City answered, putting in issue the allegations as to the plaintiffs' property rights (*id.*, pp. 62-75). Further, the City pleaded, as an affirmative defense, the State legislation of 1857 and 1871, the Secretary of War's action in fixing the bulkhead line, and alleged that after the adoption of the improvement plan of 1871 and the establishment of the bulkhead line, the plaintiffs and their predecessors in title were prohibited from filling in (*id.*, pp. 75-79). Under State practice, no reply was required.

The issues thus presented, and those actually litigated, related to the plaintiff's rights of property. This is shown by the plaintiff's proposed findings (*id.*, pp. 111-150) and the City's proposed findings (*id.*, pp. 151-170). Both parties asked detailed findings according to their conception of the plaintiffs' title and property rights, and the effect of the legislation subsequent to the grants. The plaintiffs duly raised their Federal questions as to this legislation (*id.*, Plaintiffs' Proposed Additional Findings, Nos. 22-31, pp. 146-150).

Not only were the issues as to the plaintiffs' property rights actually litigated, they were determined. The plaintiffs' grants were construed and the effect of the subsequent legislation passed upon. What was thus determined by the trial court is shown in its formal *Decision* setting forth the facts found and the conclusions of law (*id.*, pp. 171-199). The judgment recited and rested upon this decision which was required by law and which directed the judgment (*id.*, pp. 201-202). The judgment enjoined the City and its lessees "from excavating, dredging or removing the soil of plaintiffs' said premises" and directed the City "to take down and remove the overhanging dumping board or platform now erected on the northerly side of the pier in West 39th Street" (*id.*, p. 202). This relief was predicated on the conclusions as to plaintiff's title and property rights. Is it not clear that if the suit had stopped there, the decision and judgment would have constituted a final adjudication upon the question of plaintiffs' property rights in the premises in question, which had thus been actually litigated and determined?

There need be no uncertainty as to the New York practice. The present Civil Practice Act of New York went into

effect on October 1, 1921 (Civ. Prac. Act, sec. 1578). So far as the present questions are concerned, the practice under this Act and the previous Code of Civil Procedure is the same. On a trial before the Court without a jury, as in No. 15, the Court renders a decision. This decision must state separately the facts found and the conclusions of law and direct the judgment to be entered thereon and this decision so filed shall form part of the judgment roll (Code Civ. Pro., sec. 1022; Civ. Prac. Act, sec. 440). Before the cause is finally submitted, either party may submit in writing a statement of the facts which he deems to be established and the rulings upon questions of law which he desires the court to make. The court passes upon these requests. Exceptions may be taken to a refusal of the court to find any requests thus presented (Code Civ. Pro., sec. 1023; Civ. Prac. Act, sec. 439). This practice has the advantage of showing precisely what has been determined in fact and law, and the parties and reviewing courts are not compelled to extract the determination from the possible ambiguities of an opinion.

Appeal may be taken to the Appellate Division. Upon such an appeal, the Appellate Division has full power to review the law and the facts and may reverse or affirm or modify the judgment and may make new findings to sustain the judgment it awards (Code Civ. Pro., sec. 1317; former Supreme Court Rule 34; Civ. Prac. Act, sec. 584; present Rule 239).

In the instant case, both parties appealed to the Appellate Division and that court modified the judgment and made new findings which it incorporated in its order and judgment. Except as thus modified and added to, the findings and conclusions of the trial court were expressly af-

firmed (*Record*, No. 15, pp. 549-551). The Appellate Division left no doubt as to what it considered the issues to be or as to its disposition of them under its broad powers. The court stated that the questions to be determined were those of the plaintiffs' title and property rights. Thus, the court said in its opinion, that "the first point of law to be decided arises upon the contention of the plaintiffs that, by these grants, the fee simple absolute passed to the grantees, subject only to an easement reserved to the public for the streets and avenues" (*id.*, p. 556). The court then went into an elaborate consideration of the grants and the title and rights established thereby. The court held that "these were beneficial grants; that so far as the State and City were concerned, and subject only to the control of the United States over navigable waters, the grantees from the City acquired an absolute title to fill in the premises granted between the street and avenue lines, but not to make the streets, avenues, bulkhead and wharves until called upon by the City so to do or until the City approved plans therefor, and thenceforth any and all rights of the State and City to claim that any of the waters within the lines of the premises so granted were navigable were abandoned" (*id.*, pp. 556-557). The court reviewed the decisions and distinguished such cases as that of the *Knickerbocker Ice Company*, 176 N. Y. 408, and other cases cited, upon the ground that "they were not inconsistent with the right of the City to grant a fee for a valuable consideration to a riparian owner of land under water at the edge of a navigable stream not deemed necessary for navigation" (*id.*, p. 557). The court held that the grants having given to the grantees "the right to construct bulkheads on the water front of the lands granted, and to collect wharfage and cranage in perpetu-

ity'' they could not be deprived of those rights without compensation, ''and therefore they have the right to erect a bulkhead and wharf on the new bulkhead line so established by the Secretary of War, since that is the furthest west that such bulkhead may lawfully be constructed, and to exercise their rights with respect thereto'' (*id.*, p. 561). But the court denied the contention of the plaintiffs as to their right to erect piers from the bulkhead line over their premises and within the Federal pierhead line, giving effect, wrongly as we contend, to the laws of 1857 and 1871 and the provisions of the Greater New York Charter because of an erroneous view of the effect of the Federal action in locating the pierhead line (*id.*, p. 561).

The relief to which the court thought the plaintiffs were entitled followed its determination as to the plaintiffs' title and property rights. Thus the court sustained the judgment with regard to the projection over plaintiffs' premises, ''the overhanging dumping board or platform,'' upon the ground that this constituted trespass which might ripen into a prescriptive right and if in the future such projections ''should interfere with the plaintiffs' wharfage and cranage rights, a prescriptive right to maintain them might be asserted by the City'' (*id.*, p. 562). The court maintained the judgment preventing dredging inshore of the Federal bulkhead line. In view of the court's views as to the effect of the State legislation and Federal action upon the plaintiffs' rights beyond the bulkhead line, the court decided that the judgment should be modified by eliminating the provision which enjoined the dredging of the slips westerly of that line.

Not content with an elaborate opinion, the Appellate Division took the trouble to draw up a set of additional

conclusions of law (*id.*, pp. 550, 551) specifically setting forth the authority of the City to make the grants, the nature and extent of plaintiffs' rights of property, and the effect of the subsequent State legislation and of the Federal action. With respect to the validity of the grants as being in fee simple and constituting contracts which could not thereafter be impaired by State legislation, and subject only to the power of the Federal Government to regulate commerce, the Court set forth the following explicit conclusions (*id.*, p. 550):

> "26. The Legislature of this State extinguished the '*jus publicum*' in the lands under water granted to plaintiffs' predecessors in title and such grants are irrevocable and inviolable.
>
> "27. Chapter 182 of the Laws of 1837 vested in the Mayor, Aldermen and Commonalty of the City of New York the entire and absolute right and title of the State to lands under water between the Streets and Avenues, and also gave said City power and authority to convey the absolute right and title of said premises to the owners and the adjacent upland, subject only to the power of the Federal Government to regulate commerce.
>
> "31. The deeds by the City in the years 1853-1854 to Appleby and Latou, respectively, for a valuable consideration and certain covenants and agreements therein contained, formed valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation."

With respect to the rights of the plaintiffs to fill in and make dry land of the premises *inshore* of the bulkhead line, and with respect to the ineffectiveness of the attempt of

the City to change the bulkhead line through the action taken in 1916, the Court found as follows (*id.*, p. 550):

> "28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890.
>
> "29. The action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund in 1916 does not impair or destroy the property and rights of the plaintiff.
>
> "30. Said action of the Dock Commissioners with the approval of the Commissioners of the Sinking Fund, does not prohibit the plaintiffs from filling in said premises out to the bulkhead line established by the Secretary of War."

But with respect to the premises which lay *outshore* of the bulkhead line, that is, between the Secretary of War's bulkhead line and the westerly boundary of the plaintiff's grants, although far within the Secretary of War's pierhead line, the Court set forth the following conclusion (*id.*, p. 550):

> "32. The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and through the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right

> to regulate the construction of docks, piers, and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue."

It is the practice in New York to enter a judgment of the Supreme Court in the County Clerk's office upon the Order and Judgment of the Appellate Division and this was done (*id.*, pp. 551-552). This judgment (*id.*, p. 551) recited the order of the Appellate Division dated January 20, 1922 (*id.*, p. 549), which set forth the above conclusions of law, and it was upon this order and judgment of the Appellate Division that the judgment entered in the County Clerk's office rested.

It is manifest that had the litigation stopped at this point, there would have been a final adjudication upon the points set forth in the determination of the Appellate Division as to the plaintiffs' title and property rights. The conclusions above quoted were not incidental or aside from the issues. They were vital, dealing definitely with the issues as actually litigated, and the judgment rested upon the

determination of these issues. How could there be a clearer or more formal statement of what was litigated and determined?

It is elementary that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies" (*Southern Pacific R. R. Co.* v. *U. S.*, 168 U. S. 1, 48, 49). Such an adjudication is just as binding as to the conclusions of law upon which the determination rests as with respect to matters of fact.

> "The law once laid down upon a specified state of facts is binding upon the parties to the controversy and their privies for all time."
>
> *City of New York* v. *New York City Ry. Co.*, 193 N. Y. 543, 551.

See also

> *Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465, 476.
>
> *Young* v. *Farwell*, 165 N. Y. 341, 345, 346.

It makes no difference that the adjudication is in a suit in equity.

> *Young* v. *Farwell*, 165 N. Y. 341, 345, 346.

Plaintiffs appealed to the Court of Appeals from the order and judgment of modification and affirmance entered by the Appellate Division and from the judgment entered thereon (*Record*, No. 15, p. 553). The City also appealed from that portion of the judgment of the Appellate Division which affirmed the injunction against the dredging inshore of the Secretary of War's bulkhead line (*id.*, p. 552).

The Court of Appeals affirmed the judgment of the *Appellate Division* (*id.*, pp. *a*, *b*, and *c*, at beginning of Record).

The jurisdiction of the Court of Appeals was limited to the review of questions of law (New York Constitution, Art. VI. Sec. 9). (This provision was changed by a constitutional amendment adopted at the last election, in November, 1925, but the provision governed the proceedings in the present case.)

As the findings of fact had been unanimously affirmed by the Appellate Division, the only questions before the Court of Appeals were whether the findings of fact sustained the conclusions of law and whether these conclusions supported the judgment.

> *Matter of Keefe*, 164 N. Y. 352, 354;
> *Acme Realty Co.* v. *Schinasi*, 215 N. Y. 495, 501;
> *Hartley* v. *Eagle Insurance Co.*, 222 N. Y. 178, 182;
> *Appleton* v. *City of New York*, 219 N. Y. 150, 158;
> *Tierney* v. *Dowd*, 238 N. Y. 282, 285.

In *Matter of Keefe, supra*, the Court of Appeals laid down the following rule:

> "This court recently, after reviewing a large number of cases, has laid down the rule that when the Appellate Division reverses on the law we have but three questions open to us here, viz: The correctness of the rulings as to the admission and rejection of evidence; whether any material finding of fact is without evidence to support it, and whether the conclusions of law are supported by the facts found (*National Harrow Co.* v. *Bement & Sons*, 163 N. Y. 505, 508)."

In *Appleton* v. *City of New York, supra,* the same court said:

> "The Special Term by its findings of fact and conclusions of law sustained the assertions of the plaintiffs. The Appellate Division, by the findings of fact as determined by it, and legal conclusions based upon them sustained the assertions of the defendant, and reversed any finding of fact made by the Special Term inconsistent with the findings made by it. In case the new findings of fact made by the Appellate Division have support in the evidence, we must, inasmuch as its legal conclusions are upheld by the facts as found, affirm its decision (*Union Trust Co. of Rochester* v. *Oliver,* 214 N. Y. 517, 522)."

In the recent case of *Tierney* v. *Dowd, supra,* it was said by the Court of Appeals:

> "The trial justice has consequently made no findings in favor of the plaintiff on these points, but has rendered a decision in favor of the plaintiff based on evidence presented and findings made, intended to bring this case within the prohibition of the first sentence of the statute quoted above. The unanimous affirmance of these findings leaves open for review here only the question of whether these findings sustain the conclusions of law."

In the instant case, while the opinion of the Court of Appeals is not altogether clear, we think that it is demonstrable that it did not reverse or disapprove the conclusions of law reached by the Appellate Division.

The Court of Appeals showed that the questions before it turned upon the construction and effect of the plaintiffs'

grants, the quality of their title and the extent of their rights of property (*Record*, No. 15, p. 566). At the beginning of the opinion the court recognized this in saying: "This is an action to restrain the City of New York and other defendants from interfering in any way with the use and enjoyment of plaintiffs' land under the water of the Hudson River between Thirty-ninth and Fortieth streets and between Fortieth and Forty-second streets, outshore of Twelfth Avenue" (*id.*, p. 568). The court then stated the source of title, the course of the State legislation and the establishment of the Secretary of War's line (*id.*, pp. 566, 567). The court then stated the question involved in the litigation as follows (*id.*, p. 567):

> "The question is as to what extent has the City by its grants extinguished the *jus publicum* over such lands."

It is evident that in considering this question the Court of Appeals deemed it to have two phases; one with respect to the premises *inshore* of the Secretary of War's bulkhead line, and the other as to the premises *outshore* of that line. If this distinction is kept in mind, it is believed that any ambiguities in the opinion will be cleared up.

The Court of Appeals in its remarks with regard to the rights of the public, in that part of the opinion which immediately follows its statement of the question in issue as above quoted, had particularly in mind the premises lying *outshore* of the Secretary of War's bulkhead line. Thus, after its preliminary statement, the court says (*id.*, p. 567):

> "When the Secretary of War established the bulkhead line, the title of the state, the city and its

> grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it (*Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82). Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The City of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs."

It is apparent that this ruling is in accord with the determination of the Appellate Division as set forth in its Conclusion No. 32 (*id.*, p. 550).

Having reached this conclusion that the plaintiffs could not fill in any portion of their land *outshore* of the Secretary of War's bulkhead line and that the City could proceed with its plans with respect to the portion of the premises lying beyond that line, the Court of Appeals then proceeded to deal with the remaining question relating to the premises *inshore* of the Secretary of War's bulkhead line. The Court starts its discussion of this branch of the case with the statement (*id.*, p. 568):

> "But the United States acts as sovereign and the state of New York acts also as proprietor. The authority of the state in its governmental capacity over the waters of the Hudson within its limits is plenary, subject only to such action as Congress may take. (*Montgomery* v. *Portland*, 190 U. S. 89, *Matter of Public Service Commission*, 224 N. Y. 211.) It might have improved the water front itself. It

> had, however, granted all its title to the premises to the city of New York. The city might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips."

Then, after stating that so long as the lands remained under water they were subject to the sovereign power of the State to regulate their use for the purpose of navigation, and that the State had delegated such power to the City, the Court distinctly held that the City could not "as the successor to the title of the state, convey lands under waters to private owners *and retake the same by the exercise of the police power without making compensation therefor*" (*id.*, p. 568; italics ours). The general discussion that follows this statement cannot be regarded as in any way detracting therefrom, for the Court concludes its opinion with an explicit reaffirmation of the proposition that the title of the plaintiffs could not be divested without compensation and that the plan of the State as sovereign could not be carried out without re-acquiring the title which it had authorized the City to convey to private owners. The Court said (*id.*, p. 569):

> "The right of the grantee to fill in his land under water with solid filling (*Duryea* v. *Mayor*, 62 N. Y. 592, 597; 96 N. Y. 477, 496) is a delegated exercise of the public right in aid of commerce and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. *But such grant having once been made, titles traced back to the state as proprietor may not be divested by such regulations, without compensation.*

> *The grant to plaintiffs being a property right which can be resumed by the city only on payment of compensation, was a grant of all the title the city had to convey.* The right of the public was not thereby distinguished. The city had the right to dredge out all the lands under water between the piers to promote navigation. The establishment of the bulkhead line does not conflict with the right of the city in the execution of an authorized plan of harbor improvement to construct slips between the piers, *but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the city to convey to private owners.*" (Italics ours.)

Thus it appears that, not only did the Court of Appeals not overrule the conclusions of law of the Appellate Division or express disapproval of them, but it distinctly approved them. With respect to the premises *outshore* of the Secretary of War's bulkhead line, the Court explicitly sustained the position of the Appellate Division and with respect to the premises *inshore* of the bulkhead line, the Court of Appeals just as clearly held that the State had authorized the conveyance by the City to private owners and that these conveyances, that is, the plaintiffs' grants, could not be impaired without compensation, and that there could be no retaking of the property by the exercise of the police power without making compensation therefor.

In view of the explicit holding of the Court of Appeals that the grant to the plaintiffs was "a property right" which could be "resumed by the City only on payment of compensation"; that it "was a grant of all the title the City had to convey"; and that a conflicting plan of the sovereign might "not be carried out without reacquiring

the title" which it had "authorized the City to convey to private owners"; (*Record*, No. 15, p. 569), it is not necessary to review at length the cases which counsel for the City invoked on the former argument. These cases do not in any way impair the authority of the decisions of the Court of Appeals holding that under conveyances of the character here in question, title in fee simple,—all the title that the City could convey,—passed to the grantees.

In *Knickerbocker Ice Co.* v. *Forty-second Street R. R. Co.*, 176 N. Y. 408, the grant was of a right to maintain a pier at the foot of Forty-third Street. The Court held that the fee was not conveyed. The grantee had actual knowledge of the covenants with respect to Forty-third Street which were contained in the deeds to the adjoining property, and he knew the public trusts upon which Forty-second Street was held by the City. The case did not involve the title to lands adjacent to Forty-third Street.

In *Matter of Mayor*, 193 N. Y. 503, the same pier grant was involved, and the Court held that even as to that grant, it could not be destroyed without compensation (*id.*, p. 519). The Court said:

> "Conceding, for the purposes of this discussion, that the ice company has now no pier at the foot of Forty-third Street, it still retains the right to maintain a pier at that point, and that right cannot be destroyed without compensation."

But it was held that the "ice company franchises" could only be acquired by the City "in a separate proceeding brought for that purpose" (*id.*, p. 520).

The same pier right in Forty-third Street was involved in the case of *American Ice Co.* v. *City of New York*, 217 N. Y. 402 (the American Ice Company being the successor

of the Knickerbocker Ice Company) and the Court referred to its former holding that the plaintiff was entitled "to a proper compensation for the taking of his right to maintain a pier" (p. 417). The Court said further:

> "We reiterate that the deed from the City to Lindsley conveyed to Lindsley the right to maintain a pier and to collect wharfage at the foot of Forty-third Street wherever that point should be located by the lawful authority, and that the plaintiff as successor to Lindsley had the right to follow the lawful extension of said pier on Forty-third Street for the purpose of maintaining the pier and collecting revenues therefrom" (p. 417).

Instead of the *Ice Company* cases constituting authority for the proposition that the benefit of grant by the City may be taken away without compensation, they establish the contrary and award compensation to the grantee for what was only a pier right in a street. The Appellate Division in the instant case, No. 15 (p. 557) referred to these cases and held that they were in no way inconsistent with the established rule that the State had authority to grant a fee for a valuable consideration to a riparian owner of land under water at the edge of a navigable stream and that conveyances of the sort in question here conveyed the fee.

It should be borne in mind that conveyances of this sort, that is, of water lots along the shore in the intermediate spaces between streets, are grants of a well-known character upon which rest titles of the greatest value. They have been taken and paid for in good faith for generations and it is proper to say that the courts of the State of New York have never impugned them. As has been said, the

Court of Appeals in this very case, sustains the title of the plaintiffs inshore of the Federal bulkhead line completely (*Record*, No. 15, pp. 568, 569). The question with regard to the premises outshore of that line, we shall presently consider and we believe it to be plain that the ruling of the court as to that portion of the premises was due entirely to an erroneous construction of the Federal action in establishing a bulkhead line. But on the main question as to the quality and effect of the plaintiffs' deeds as against the State and City, we consider it to be remarkable that the City's counsel should attempt in any way to derogate from the decisions of the State Courts which have sustained the titles acquired under grants of this description as being in fee simple and of the benefits of which the grantees could not be deprived without compensation.

In *People* v. *New York & Staten Island Ferry Co.*, 68 N. Y. 71, another case cited by counsel for the City, the grant was made pursuant to the Act of 1813, which was quite distinct in the nature of the authority granted to the City, from the Act of 1837. The latter Act extended the *ripa*, to make land, fill in and improve. There was nothing in the decision in the *Staten Island Ferry* case which qualified that in *Duryea* v. *the Mayor*, 62 N. Y. 592, decided but a short time before by the same court, composed of the same judges. In the *Duryea* case the court held that in the case of a conveyance like those here in question "the estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an absolute owner except as restricted by the covenants and restrictions contained in it".

The counsel for the City has also cited *Coxe* v. *the State*, 144 N. Y. 396, which was a grant by the Legislature beyond

the limits of its powers distinctly held to be in conflict with the Constitution, whereas in the present case, and in many other cases, grants of this limited and reasonable character along the shore have been held to be in accordance with the Constitution of the State. The Act of the Legislature in the *Coxe* case attempted to empower a corporation to become vested with the title to such portions of lands under the waters of the sea and the sound as it chose to designate within the limits of Kings, Queens, Richmond and Suffolk except the City of Brooklyn. While the Court held this grant to be invalid under the State Constitution, it distinctly recognized the propriety of conveyances of the class here under consideration. The Court said (*id.*, p. 407):

> "Such a grant, therefore, can never constitute a contract between the state and the grantee which is beyond the power of revocation by a subsequent legislature. For every purpose which may be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the city of New York of the lands under water below the shore line around Manhattan Island clearly comes within this principle, since it was a grant to a municipality, constituting a political division of the state, for the promotion of the commercial prosperity of the city, and consequently of the people of the state. (*Langdon* v. *Mayor, etc.*, 93 N. Y. 129.) So, also, grants to railroads for rights of way and other facilities for the transaction of their business, made under the authority of the state, have been held valid upon the same principle (*Saunders' Case, supra*), as well as to corporations and private persons engaged in com-

> merce or navigation for their necessary or reasonable use. Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have long been authorized and recognized as one of the uses to which the state may lawfully apply such lands."

In *Matter of Long Sault Development Co.*, 212 N. Y. 1, the Court said at p. 8:

> "The power of the legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day."

In that case, the grant was found to be unreasonable in its extent. There can be no question of unreasonableness in the deeds in the present case, which involved merely the extension of the *ripa* along the mud flats which bordered the shore. Grants of this kind to private persons have not only been recognized repeatedly as reasonable, but they were essential to the development of the City. The power of the Legislature to provide for these grants was recognized in the *Knickerbocker Ice Co.* case, 176 N. Y., at p. 413, and the *American Ice Co.* case, 217 N. Y., at p. 405. The Court in the *Long Sault* case, *supra*, refers to the early case of *Lansing* v. *Smith*, 4 Wend. 9, which clearly recognized this power. And to the case of *Langdon* v. *Mayor*, 93 N. Y. 129, which recognized the power and said that a "constitutional barrier stands in the way" of an appropriation without compensation, of a right acquired by these grants (93 N. Y. 161).

In *People* v. *Steeplechase Park Co.*, 218 N. Y. 459, the

question related to a grant of land under water at Coney Island. The Court said (p. 479):

> "During all our history the legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters. The public interest may require the building of docks and piers to facilitate approach to the channel of such navigable waters. The beneficial enjoyment of land adjoining the channel of public waters may require or at least justify the conveyance of lands below high water on which to erect buildings. As in England the crown and Parliament can without limitation convey land under public waters, so in this state land under water below high-water mark can be conveyed by the legislature, or in accordance with constitutional and legislative direction."

Nor do the decisions of this court in any way conflict with the construction of the conveyances for which we contend and which they have received from the New York decisions.

In *Montgomery* v. *Portland*, 190 U. S. 89, there was no grant involved, but it was contended by the riparian owner that the Act of Congress of 1890 deprived the local authorities of power in respect to the buildings and structures in the river (*id.*, p. 104).

In *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, there was no question of any State grant but merely of the paramount right of Congress to fix a line.

There is nothing in the instant case which involves the question decided in *Philadelphia* v. *Stimson*, 223 U. S. 605.

The plaintiffs in error are not seeking by virtue of their grants to maintain any right or title in opposition to

the Federal Government. They, of course, recognize the Federal bulkhead line; likewise the Federal pierhead line. The question is as to the rights they may exercise consistently with the Federal action. And upon this point, the plaintiffs point to the series of State decisions which establish conclusively that conveyances of the sort here in question pass title in fee.

Duryea v. *Mayor*, 62 N. Y. 592.
Langdon v. *Mayor*, 93 N. Y. 129.
Duryea v. *Mayor*, 96 N. Y. 477.
Williams v. *Mayor*, 105 N. Y. 419.
Mayor v. *Law*, 125 N. Y. 380.

The decisions are cited and quoted from *infra*, in the part of our argument dealing with the questions raised in No. 16.

The counsel for the City makes an attempt to distinguish these cases, establishing the rule for which we contend, upon the ground that, in some of them, the land conveyed had already been filled in. That attempt meets an immediate answer in the decision of the Court of Appeals in the present case. The lands of the plaintiffs in error had not yet been filled in, for the reasons we have stated, inshore of the Federal bulkhead line, and yet the Court of Appeals has held explicitly that inshore of that line the plaintiffs have title in fee which cannot be retaken by the City without compensation. Plainly, then, the rights of the plaintiffs do not depend upon filling in and that is no ground for distinguishing the cases we have cited. Deeds of land under water, of the sort here in question, for which value has been paid, conveying premises in fee upon which the owners are taxed, are not made at the

peril of destruction the day after their execution because the premises have not been filled in. The conveyances, as repeatedly stated by the Court of Appeals, and as reiterated in the instant case, are grants of the fee with right to fill in. The City cannot take the money for grants of this sort and then repudiate the title. If the City desires to reacquire the title and to make new plans of water-front improvement, the City should purchase or condemn. The Court of Appeals in this case has denied the right of the State, and of the City, acting under its authority, to establish a bulkhead line inside of the Federal bulkhead line without paying compensation to the plaintiffs. Of what avail then is it to attempt to invoke expressions of the Court of Appeals in other cases, directed to other points, in the face of this decision upon the precise question? Why cannot the City, as the Court of Appeals holds it cannot, establish a new bulkhead line inshore of the Federal bulkhead line? If the statement in the Ice Company cases, and other cases cited by counsel for the City are to be taken to mean that the deeds of the City of the sort here in question did not convey a fee, and that the State and the City acting under its authority can, despite such conveyances, regulate the water-front as they please, then certainly the Appellate Division and the Court of Appeals would not have held that there could be no retaking of the title inside of the Federal line without making just compensation.

That this is the correct view of the decision was admitted by counsel for the City in its brief No. 15 upon the former argument in this Court in which it is stated, referring to the result in No. 15:

> "The Courts of New York have restrained the City and the other defendants from interfering with

> the plaintiffs' rights inshore of the bulkhead line (R. pp. 551-552) and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with the land under water outshore of the bulkhead line" (*Former brief for defendant in error*, City of New York, in No. 15, p. 9).

While we have good ground for objecting to this statement so far as the adequacy of relief awarded is concerned, *it is a perfectly clear, as well as a necessary, admission as to what the State Court decided in No. 15.*

It is idle, therefore, for counsel for the City to attempt to find in any expressions in the opinion of the Court of Appeals a basis for any argument derogating from the plaintiffs' title and right to fill in the premises in question *inshore* of the Secretary of War's bulkhead line. What the Court of Appeals itself said, as above quoted, would be sufficient upon this point, as well as the fact of its affirmance of the judgment below. The Court of Appeals, like other courts has had frequent occasion to criticize efforts to attribute to expressions in its opinion an effect which would override or change the points actually decided.

In *Colonial City T. Co.* v. *Kingston R. R. Co.*, 154 N. Y. 493, 495, the Court said:

> "If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the *dicta* of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is revelant, and when it wanders from the point at issue it no longer has force as an official utterance. The failure to read the opinions of courts with this fact in mind gives rise to much fruitless litigation."

See also,

Stokes v. *Stokes*, 155 N. Y. 581, 594.
Ingersoll v. *Nassau Electric R. R. Co.*, 157 N. Y. 453, 457.
Roberson v. *Rochester Folding Box Co.*, 171 N. Y. 538, 551.
People ex rel. McLaughlin v. *Police Comrs.*, 174 N. Y. 450, 466.

And in *Crane* v. *Bennett*, 177 N. Y. 106, 112, the caution was repeated in these words:

> "It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wrestling it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arises as to the effect of a decision will be practically avoided."

In No. 15, the Court of Appeals had before it the explicit conclusions of the Appellate Division which sustained its judgment and the Court of Appeals directed affirmance without modification. Its somewhat discursive statements in its opinion does not impair or obscure the actual decision.

The ruling, and the opinion itself, properly interpreted, fully confirmed the Appellate Division and gave us the result which counsel for the City explicitly asserted in the statement we have quoted from the City's former brief.

Second. The Federal question presented.

The Federal question is presented by Conclusion 32 of the Appellate Division (*Record*, No. 15, pp. 550-551), the ruling approved by the Court of Appeals whose determination denying plaintiffs' rights in the part of the premises covered by their grants outshore of the bulkhead line (*id.*, pp. 567, 568). The plaintiffs' constitutional rights under the contract and due process clauses of the Federal Constitution were appropriately raised (*Record*, No. 15, Plaintiffs Proposed Additional Findings, Nos. 22-31; pp. 146-150; 221, 287) as against the State legislation thus sustained. These constitutional questions were insisted upon from the beginning to the end of the litigation in the State Courts. There can be no dispute as to this.

The conclusion of the Appellate Division was:

> "32. The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and though the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers, and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet

of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue."

The ruling of the Court of Appeals was to the same effect, as appears from the following statements in its opinion, which we may again quote (*id.*, pp. 567-568):

> "When the Secretary of War established the bulkhead line, the title of the state, the city and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it. (*Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82.) Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The city of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs."

This ruling of the State courts, both in terms and in substance, gave effect to State legislation subsequent to plaintiff's grants. It makes no difference that the State courts

thought this result could be based on the Federal action in fixing the bulkhead line. It was the State legislation, and not the Federal action, that prevented the plaintiffs from building piers on their premises out from the bulkhead line to the boundary of their property. As stated by the Appellate Division, it was Chapter 763 of the Laws of New York, of 1857, that provided that no pier should be erected within one hundred feet of another pier, and it was Chapter 574 of the Laws of 1871, as supplemented and amended, that authorized the city of New York to adopt a plan for water front which included the erection of piers. The city of New York, in the execution of its plans, to which the Court of Appeals referred, for the improvement of the water front westerly of the bulkhead line, acted under legislation of the State, and the City's plan itself was legislative in character. The result of this legislative action, to which the decision of the State court gave effect is, as explicitly stated, that the plaintiffs are prevented "from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the secretary of war and 13th Avenue" (*id.*, pp. 550-551).

There can be no question but that this State legislation, subsequent to the grants, impaired the obligation of the grants. The granted premises extended to the described boundary at Thirteenth Avenue, as originally planned. These grants, as the State courts have held, were for beneficial enjoyment. The Court of Appeals, in its opinion, called attention to the fact that "Great cities have been built up by grants of land under water" and that "The city of New York has been similarly developed by extending it over submerged lands" (*id.*, p. 568). In making these beneficial grants and thus extending the *ripa*, no interference

with navigation was proposed. The purpose was to develop the water front. The Court of Appeals put the matter succinctly in saying that the State "might have improved the water front itself. It had, however, granted all its title to the premises to the city of New York. The city might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips" (*id.*, p. 568). The grant to the plaintiff "was a grant of all the title the city had to convey" (*id.*, 569).

There was nothing in the plaintiffs' grants requiring that piers should be one hundred feet distant from each other, as was subsequently provided by the State legislation of 1857. There was nothing in the plaintiffs' grants that "prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises" outshore the line which was subsequently fixed as the bulkhead line. The grants made no distinction as to the rights of the plaintiffs with respect to any particular portion of the premises granted, as all these premises lay between the streets and avenues. So far as the State and city were concerned the plaintiffs had the same rights in one part of the premises as in another, and the plaintiffs had also the right to take wharfage, cranage, etc., on the westerly side of the premises granted. So far as the State was concerned, it had no right, after these grants for beneficial enjoyment, to impair the plaintiffs' right in any part within the limits of the premises granted. The State courts have held in this case, both in the Appellate Division and the Court of Appeals, that within the bulkhead line the State and the city had no power to prevent the plaintiffs from enjoying the benefit of their property. The State, it was said, could not

retake the property or deprive the plaintiffs of their property rights or those advantages for which the grants stipulated except upon making just compensation. The grants did not stop at the line subsequently fixed by the bulkhead line. So far as the State and city are concerned, the plaintiffs had just as complete title to their premises beyond this line as within it. The State legislation, to which the decision below gave effect, impaired the plaintiffs' grants as effectively *outshore* of the bulkhead line as legislation would have impaired them in preventing the use of their property *inshore* of the bulkhead line.

The sole question, then, is not whether effect has been given to the State legislation subsequent to the grants, or whether this legislation impairs the obligation of the grants, but whether this impairment is required or justified by the Federal action which has been invoked to sustain it.

Third. The effect of the Secretary of War's pierhead line and the rights of the plaintiffs under their grants with respect to the portion of the premises between the Secretary of War's bulkhead line and his pierhead line.

It is apparent from the decision of the State Court in No. 15 sustaining the rights of the plaintiffs inshore of the Federal bulkhead line, that this line derives its controlling character from the fact that it was established by Federal action. Had there been no Federal action fixing a line of solid filling, the plaintiffs, according to the decision of the State Court, would have been entitled to the complete use of the granted premises as provided in the grants and the city could not have deprived them of this use without compensation.

The question then is reduced to this: What was the scope and effect of the Federal action?

The fixing of the bulkhead line by the Secretary of War cannot be made to do duty for more than this action determined. The bulkhead line thus became the line of solid filling. It is recognized as such. It created no rights in the State and the city with respect to the remainder of the plaintiffs' premises *outshore* the bulkhead line save that these premises should not be solidly filled in.

The plaintiffs retained all their rights of property that could be exercised consistently with the Federal action in establishing a bulkhead line. We submit that the State Court is in error in holding that this action subordinated the use of the premises to the requirements of navigation in any way that the State and city might see fit, regardless of the provisions of the grants. The fixing of the bulkhead line did not subject the plaintiffs' premises to the uses of navigation except to the extent that the premises could not be solidly filled in. Nothing else was determined by the establishment of the bulkhead line.

The fact that there might be uses of the premises by building piers, wharves and other structures not requiring a solid filling, is conclusively shown by the Secretary of War's action in establishing a pierhead line,—that is, a line to which piers might extend, and it is undisputed that the Secretary of War's pierhead line lay far out beyond the boundary of the plaintiffs' premises. There was nothing in the Secretary of War's action either as to the bulkhead line or as to the pierhead line which prevented the use of the plaintiffs' premises between the bulkhead line and the boundary of those premises for the purposes of piers. If the pierhead line was to be the limit of the piers, obviously there could be piers within that limit.

Upon the former argument we produced the original of Exhibit "C", the Secretary of War's map, an authenticated document of the Federal Government. We called attention to the fact that it bore this notation:

> "*The bulkhead line defines the limit for solid filling; the pierhead line, the limit to which open piled structures may be built*" (italics ours).

So far then as Federal action is concerned, open piled structures could be built on the plaintiffs' premises between the Federal bulkhead line and the westerly boundary of those premises. The question then is: Who has the right to build these structures? The city gave all the right it had to the plaintiffs, and they by virtue of their grants, if their grants are maintained unimpaired, have the right to build these structures consistently with the Federal rule. They have just as much right, as against the State and the city, to build such structures upon their premises outshore of the bulkhead line as they had to fill in solidly inshore of the bulkhead line. They derived both rights from their grants. The only reason that one right is qualified is because of the Federal action,—not of any right of the State and city to impair the grants. The plaintiffs' property rights were not destroyed or affected by the Federal action so long as they are not exercised in conflict therewith.

But under the decision below, the State court has deprived the plaintiffs of all enjoyment of their premises outshore of the bulkhead line. They can have, the city maintains, no profitable use whatever of these premises. They cannot improve them in any way however consistent with Federal rules. They cannot obtain any wharfage or cranage or any advantages therefrom.

The action of the Federal Government in fixing bulkhead and pierhead lines did not afford any right to the city to say that the premises of the plaintiffs outshore the bulkhead line could not be covered with piers. The Federal Government did not establish a pier plan, but only a pierhead limit. Because the Secretary of War has laid down a line beyond which piers may not extend, the State says, through its legislation, that the plaintiffs shall have no piers at all.

If the State and the city wish to strip the plaintiffs' property of all its beneficial incidents outshore the bulkhead line, this may be done only upon the payment of just compensation. The reasoning of the courts below with respect to the plaintiffs' rights *inshore* of the bulkhead line is just as controlling with respect to the plaintiffs' rights *outshore* of the bulkhead line so long as these are exercised in due subordination to the Federal requirements.

We therefore insist that as the plaintiffs' premises lie far inside of the Secretary of War's pierhead line that the city, under the legislation of the State, has no right to occupy these premises for the purposes of its basins and slips and to act as proprietor by making the plaintiffs' premises tributary to the piers which, as proprietor, the city leases for the exclusive use of its lessees.

The city has not built the piers as continuations of the public streets or public piers as contemplated by the grants. The city has built piers, fenced them in, shedded them, and holds them with the assertion of exclusive proprietary rights, excluding all persons from their use and access thereto save its lessees and their patrons. Not content with this, the city, under the legislation of the State, precludes the plaintiffs from building any piers whatever over

their property between the streets and thus the city not only uses its own piers but compels the plaintiffs to submit to the use of their property for basins and slips for the city's piers. There is thus a complete appropriation by the city, which claims the right of appropriation under the State legislation of all the plaintiffs' premises outshore of the bulkhead line without compensation.

Our contention on the Federal question is that the legislation subsequent to the grants, to which this effect has been given, is invalid as an impairment of the obligation of contract and that the city should be restrained from appropriating the plaintiffs' premises in this manner unless and until compensation is made. The city should be enjoined from any interference with the plaintiffs' improvement of their premises for the purpose of building and maintaining wharfs and piers, and taking wharfage and cranage, and having access to the piers built within the lines of the streets, all being in accordance with their grants and not in conflict with the action of the Secretary of War in establishing the bulkhead and pierhead lines.

No. 16—Appleby v. Delaney.

First. What was determined by the State Court?

The application was for a *mandamus*. It was denied but "as a matter of right, and not in the exercise of discretion", as the order explicitly states (*Record, No. 16*, p. 4).

The nature of the determination of the State Court in this proceeding is to be ascertained by an examination of the record. Again, we must call attention to the repeated statements of the Court of Appeals of New York, some of which we have quoted, that expressions in their opinions are not to be taken to countervail the record of the court's determination.

In No. 16 the decision relates to the premises *inshore* of the bulkhead line as to which the plaintiffs' title and right to fill in was sustained in No. 15. After the decision in No. 15 by the court of first instance, the plaintiffs applied to the appropriate authorities of the City of New York for a permit to fill in their premises out to the bulkhead line established by the Secretary of War. The municipal authorities refused the permit upon the ground that under the legislation of the State a bulkhead line had been fixed 100 feet farther inshore than the line of the Secretary of War. This was the only ground for the refusal. (See *Application for Permit, Record No. 16*, Schedule A, pp. 24-34; *Denial of Application, id.*, Schedule B, p. 35; *Proceedings for New Bulkhead Line, id.*, Schedule I, pp. 59-62.)

There is no controversy with respect to this. As the counsel for the City stated in his brief in No. 16 upon the former argument:

> "After the decision in *Appleby* v. *The City of New York* by the court of first instance, the plaintiffs

applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890 (R., pp. 24-34). The commissioner of docks refused the permit on the ground that a bulkhead line had been established by the State authorities 100 feet farther inshore than the line of the Secretary of War (R., pp. 64, 65) (see map, p. 58). It was his contention that no filling beyond the State's new bulkhead line could properly be made."

It was upon this refusal by the municipal authorities of the appropriate permit, that the plaintiffs asked for a *mandamus* in order that they might proceed with the improvement which they were entitled to make. Their petition not only set forth their property rights, but expressly invoked the contract and due process clauses of the Federal Constitution, thus raising the Federal question with respect to the authority of the City under the State legislation subsequent to the grant to establish a bulkhead line inshore the Federal line (*id.*, pp. 10-11).

The City answered opposing the application solely on the ground that the City had made its new plan establishing the new bulkhead line (*id.*, pp. 64, 65). This affidavit of the Commissioner of Docks in answer to the plaintiffs' petition is the only pleading in the proceeding.

The court of first instance denied the *mandamus* as a matter of right (*id.*, p. 4) and in its opinion (*id.*, p. 66). In its opinion, the court said that the permission of the City had not been granted, and that seemed to the court to be the end of it. In its very short opinion the position of the plaintiffs was seriously misconceived. Thus, the opinion

spoke of the inaction of the grantees. It wholly ignored the fact that almost immediately after the making of the grants the New York Legislature proceeded with new plans in 1857; that after the plaintiffs had started to improve their property, the Legislature passed the Act of 1871, which provided expressly for the condemnation of the water front rights which had previously been granted so that the new plans could be carried out; that the plaintiffs could not proceed to improve the premises in the face of this proposed condemnation; and that the City in 1894, actually instituted condemnation proceedings in which it was proposed to retake title to and pay for all the plaintiffs' premises and that these proceedings had dragged along until 1914, when the City discontinued them. The suit in No. 15 was then promptly brought to establish the plaintiffs' rights of property, and when the court of first instance had measurably sustained these rights, the *mandamus* proceeding in No. 16 was instituted. The plaintiffs have never been allowed to improve their property. Attributing delay to the plaintiffs in these circumstances is wholly unjustified.

On appeal to the Appellate Division, that court reasserted the plaintiffs' rights of property. The court said (*Record*, No. 16, pp. 73-74):

> "We are deciding in the action that the rights of the appellant are not limited or restricted by this bulkhead line, but only by the bulkhead line which has been approved by the Secretary of War. They have, we think, an absolute right to fill in from the land granted by the same grants easterly of 12th Avenue, which has been filled in, to that bulkhead line, for it was fairly contemplated by the grants that they were to have free and unrestricted access to the bulk-

> head or wharf from all of the lands granted which might lie easterly of the bulkhead line when lawfully established, in order that they might enjoy the wharfage and cranage rights granted to them in consideration of the money paid by them and obligations to build bulkheads and to make and continue in repair the streets and avenues within the exterior boundaries of the grants; and of such rights they can be deprived only by a voluntary relinquishment thereof, or by the exercise of the right of eminent domain, and making to them just compensation therefor (*Langdon* v. *Mayor*, 93 N. Y. 129; *Williams* v. *Mayor*, 105 N. Y. 419; *Matter of Commissioner of Public Works*, 135 App. Div. 561, aff'd 199 N. Y. 531)."

The Appellate Division did not take the view that the City was entitled to refuse permission to the plaintiffs to improve their property. The court *held* that the *mandamus* should issue, but that if the municipal authorities deemed it necessary that the bulkhead should be built on the new line sought to be established in 1916, the City should have an opportunity to acquire the property and property rights of the plaintiffs. The following was the statement of the conclusions reached (*id.*, p. 74):

> "Since no objection was made by the Commissioner of Docks to the alternative plans for this improvement presented by the appellants, and there has been extensive litigation between the parties, which should be brought to an end, the order should be reversed and the motion for a peremptory writ of mandamus, requiring the respondent to issue a permit to the appellants based on one or the other of the proposed plans, as the same may be modified by him with a view to safeguarding the public in-

terests, should be granted; but if the Commissioner of Docks deems it necessary that the bulkhead and wharf should be built on the bulkhead line so established in 1916, the City should be afforded an opportunity to acquire the property and property rights of the plaintiffs essential to have the improvements conform to that bulkhead line.

"It follows that the order should be reversed without costs, and motion granted without costs; but it will be provided in the order that the writ shall not be issued for thirty days, and if within that time, an appropriate condemnation proceeding shall be instituted to acquire the property and property rights of the relators, then the issuance of the writ shall be suspended for a reasonable time to enable the City to acquire such property and property rights, but otherwise the writ will be issued at the expiration of 30 days."

On appeal by the City to the Court of Appeals, the order of the Appellate Division was reversed and that of the Special Term affirmed (*id.*, pp. *a*, *b*, *c*).

This final decision of the State Court necessarily gave effect to the legislation of the State, and the action of the municipal authorities thereunder, establishing the new bulkhead line of 1916. The City had denied the plaintiffs' application upon the ground that their improvement conflicted with this new plan. The City opposed the petition for *mandamus* solely upon this ground and the Court as a matter of right denied the *mandamus*. Thus the City's plan and the legislation under which it was adopted is made completely effective overriding the plaintiffs' grants and property rights.

Second. The Federal question.

As against this determination the plaintiffs urged in their petition (pp. 10-11) and throughout the proceeding insisted upon their constitutional rights under the contract and due process clauses of the Federal constitution.

The fact that the Court of Appeals invoked the municipal ordinance of 1844 does not change the nature or effect of this determination. The contract clause of the Federal constitution would amount to nothing if a state court could construe for itself the grant which is alleged to be impaired by state legislation. Whether there is a contract, and whether it is impaired by the legislation, is necessarily a matter for the determination of this Court, if the contract clause is not to be a mere form of words.

The endeavor to qualify the plaintiffs' grants, by reference to the municipal ordinance, does not remove the case from the application of this rule. It makes no difference whether the ordinance is sought to be read into the grants or the grants are said to be construed in the light of the ordinance. It comes to the same thing,—that the grants are thus construed and limited. To determine whether they should thus be construed and limited is to determine what the plaintiffs' contracts are, their scope and effect. Suppose, for example, as is often the case, that the grant was found entirely in a municipal ordinance. It would none the less be for this Court to construe for itself the contract thus evidenced.

Thus in *Louisiana Railway and Navigation Co.* v. *Behrman*, 235 U. S. 164, the contract alleged to have been impaired was based upon a municipal ordinance. The State Court held that this ordinance, and hence the contract, was

"subject to a suspensive condition and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken" (235 U. S. pp. 169-170). When the case came before this Court, there was a motion to dismiss upon the ground that the State Court had given no effect to the subsequent enactment which was alleged to impair the contract, because of its construction of the ordinance and its conclusion as to the "suspensive condition." It was urged that this was a non-Federal ground as the ordinance, on which the alleged contract rested, being subject to a condition, had not become effective.

This Court declined to give assent to this contention and held that it was its duty to construe the ordinance for itself. The Court recognized, of course, the established rule that where the State Court does not give effect to a subsequent enactment, the jurisdiction of this Court under the contract clause does not attach. But where the necessary consequence of the decision is to give effect to the subsequent enactment, the jurisdiction of this Court is not to be escaped because the decision of the State Court is placed upon the ground that the contract was not made or has become inoperative through failure to perform an alleged condition or otherwise.

In *Detroit United Ry.* v. *Michigan*, 242 U. S. 238, 247, 248, 249, the Court said:

> "But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this

irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation. *McCullough* v. *Virginia*, 172 U. S. 102, 116, 117; *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66, 77; *Terre Haute &c. R. R. Co.* v. *Indiana*, 194 U. S. 579, 589; *Hubert* v. *New Orleans*, 215 U. S. 170, 175; *Fisher* v. *New Orleans*, 218 U. S. 438, 440; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 376; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U. S. 164, 170. The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error. Whether the agreement thus invoked, when properly construed, has the effect attributed to it, is a question that touches upon the merits, and not upon the jurisdiction of this court."

* * * "But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation? *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66, 77; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 147; *Terre Haute &c. R. R.* v. *Indiana*, 194 U. S. 579, 589."

See also

Columbia Railway v. *South Carolina*, 261 U. S. 236, 245.

This Court has held that it will not limit itself, in determining whether effect has been given to the later statute, to the mere construction of the language of the opinion of the State Court.

McCullough v. *Virginia*, 172 U. S., 102, 117.
Houston & Texas Central R. R. Co. v. *Texas*, 177 U. S., 66, 76, 77.
Hubert v. *New Orleans*, 215 U. S., 170, 175.
Carondelet Canal Co. v. *Louisiana*, 233 U. S., 362, 376.
Long Sault Development Co. v. *Call*, 242 U. S. 272, 277.

Under the decision of the State Court, the City is permitted to go ahead with its bulkhead plan of 1916, which was the sole ground for the denial of the City's permit, and is allowed to ignore any contention of the plaintiffs that they have rights in opposition to that plan. The question is whether the plaintiffs' grants, construed in the light of the ordinance invoked, admit of such a construction as to give the municipal authorities the arbitrary and absolute power to prevent the plaintiffs from making any improvements on their premises, although consistent with Federal action and however well designed. If this is not the true construction of the grants, they are manifestly impaired by the legislation subsequent to the grants under which the City has made its new plan.

Third. The true construction of the plaintiffs' grants in the light of the ordinance invoked by the City.

It is most extraordinary, when one considers the development of the water front in New York City, that this

is the first time, we believe, that this ordinance has been successfully invoked to qualify and limit beneficial grants of the character under consideration. The ordinance was passed in 1844. It is said by counsel for the City that it was made irrevocable by the Laws of New York of 1845, Chapter 225, Section 5, which is quoted on page 6 of the brief of counsel for the City in No. 16 upon the former argument. We do not see that the Act of 1845 in any way changes the question or supports the contention of the City as to the construction of the plaintiffs' grants, but it will be observed that the intent of Section 5 of Chapter 225 of the Laws of 1845 was simply to make the ordinance of 1844, and other ordinances mentioned in that Act, unamendable only in so far as they related to the sinking fund. It was the integrity of the *sinking fund* for the redemption of the City debt, and not the permission to make improvements under the City's grants, that the Act of 1845 sought to protect.

The provision of the ordinance of 1844 which is here invoked is as follows:

> "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It will be noted that the ordinance provides that the prescribed "permission" is to be "had and obtained from the *Common Council.*" It was, therefore, entirely appropriate in any view for the Common Council to give this permission. But the plaintiffs' grants were made directly *by* the Common Council. The grant of 1853 was made by "The Mayor, Aldermen and Commonalty of the City of

New York." It was signed by "*Jacob A. Westervelt, By The Common Council, D. T. Valentine, Clk., C. C.*" (that is, Clerk of the Common Council). It was acknowledged by D. T. Valentine as Clerk of the Common Council, who in his affidavit says that the seal affixed to the grant was affixed by the authority of the Common Council. (*Record*, No. 15, Ex. 4, pp. 376-377). The grant of 1852 was made by the Common Council in like manner (*id.*, Ex. 5, p. 387; *Record*, No. 16, p. 55).

The Common Council in these grants expressly provided as to what permission for improvements should be required, and it has been held explicitly by the State Court that the permission referred to in the grants only related to that portion of the premises lying within the streets and avenues, which was excepted from the grants and which the plaintiffs had covenanted to build upon request.

We have this extraordinary situation: In No. 15 the plaintiffs distinctly presented in their complaint the question of their right to fill in the granted premises without obtaining permission from the city. The complaint alleged as follows (*Record*, No. 15, Amended Complaint, par. XVII, p. 16):

> "XVII. That the plaintiffs and their testator and predecessor in title had a right under said grant and under the Laws of the State of New York to fill in all of said land under water between Thirty-ninth and Fortieth Streets, Twelfth and Thirteenth Avenues, shown on the map in Schedule "A" herein, and to reclaim it from the river and make it dry land, *without having first to obtain permission so to do from the City of New York or its predecessor, the Mayor, Aldermen and Commonalty of the City of New York*" (italics ours).

This allegation was denied by the City's answer (*id.*, p. 64, Amended Answer, par. 17, p. 64). It was upon this issue that the Appellate Division passed in its conclusion No. 28 with respect to the premises *inshore* of the bulkhead line fixed by the Secretary of War (*id.*, p. 550) as follows:

> "28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890."

And, as we have seen, this conclusion was not disturbed by the affirming judgment of the Court of Appeals in No. 15 which said distinctly that the title to this portion of the premises could not be retaken by the city by the exercise of police power, without making compensation (*id.*, pp. 568, 569).

Moreover, the decision of the court of first instance in No. 15 passed upon the effect of the covenants in the grants relating to the permission required for making lands as follows (*id., Decision,* pars. (14), (15), pp. 197-198):

> "(14) VII. The covenant by the grantee, that he, his heirs and assigns
>
> 'will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,'
>
> relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.

"(15) VIII. The covenant by the grantee, that he, his heirs and assigns

'will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose,'

refers only to the lands under water in front of the plaintiffs' premises and there is no such covenant as to the granted premises between the streets and avenues."

These conclusions were not disturbed by the Appellate Division or by the Court of Appeals in its decision in No. 15 (*id.*, p. 551).

So that, in support of our contention as to the true construction of the grants, we have not only the argument that we advance but the actual determination of the State Court in No. 15, which sustained this construction with respect to the premises *inshore* of the Federal bulkhead line, and with respect to the meaning of the covenants in the grants requiring permission of the City authorities for improvements within that line. We have in No. 15 the issue presented, as a part of the issue relating to the plaintiffs' title and the extent of their property rights, whether they were entitled to improve their premises inshore of the Federal bulkhead line without the consent of the City and an adjudication explicitly to the effect that they did have this right. And, it is only with respect to this portion of the premises that the application in No. 16 had reference.

This determination in No. 15 is consistent with the prior rulings of the Court of Appeals of New York in relation to the true construction of this class of grants.

These conveyances, for beneficial purposes, extending the *ripa* by granting the fee simple under the legislative authority given for that purpose, was construed in *Duryea* v. *Mayor*, 62 N. Y. 592 (the first *Duryea* case), and that construction had never been disturbed prior to the opinion of the Court of Appeals in No. 16. In the first *Duryea* case the Court said (pp. 596-597):

> "There is certainly no express prohibition or covenant against filling in the intermediate spaces between the shore line and the line of the streets, avenues, wharves, etc. The deed conveys nine several pieces of land under water by metes and bounds, adjoining certain contemplated streets running to the East river. The spaces to be occupied by streets are not conveyed. It contains covenants that the grantee shall, within three months after being required, make and construct the streets and wharves and bulk-heads referred to, 'and will also fill in the same with good and sufficient earth, and regulate and pave the same and lay the sidewalks thereof.' It also contains a covenant that the grantee will not build the streets, wharves, etc., 'or make the lands in conformity with the covenants hereinafter' mentioned, until permission shall be obtained from the city. The only covenant in the deed for *making* lands applies exclusively to the building of streets, wharves, etc., and there is not a word pertaining to the intermediate spaces. It is claimed that there is an implied prohibition against it because it is impracticable to fill in the intermediate spaces without the streets and wharves for support. There is no evidence to this effect, nor can we take judicial notice of the fact." * * * "*The estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an ab-*

solute owner except as restricted by the covenants and reservations contained in it. The beneficial enjoyment of property belongs to the ownership and the construction contended for would deprive the plaintiff or any such enjoyment, until the city ordered the streets and other structures to be made. It is a general rule that exceptions and restrictions are to be construed strictly against the grantor and are not to be extended beyond the fair import of the language expressed except by necessary implication. No such implication arises in this case. While the city properly retained the control and direction of the time and manner of making streets, etc., it is not apparent how that control is inconsistent with the beneficial enjoyment of the intermediate spaces. It certainly does not appear in the case as now presented. It is unnecessary to consider other questions" (italics ours).

Upon this construction of grants of this class, that the grantees have a fee simple with the privileges of an absolute owner except as restricted by the covenants and reservations contained in the grants, the water front of the City of New York has been improved and millions of dollars have been expended. Numbers of grantees under such grants have enjoyed these rights of property of which under the ruling in No. 16 it is now proposed by the City that the plaintiffs shall be deprived.

It is said that in the first *Duryea* case the ordinance of 1844 was not brought to the attention of the Court. The significance of this fact seems to us to be quite different from what the City contends it to be. For the first *Duryea* case reached the Court of Appeals in 1884, forty years after the ordinance in question. The City was a defendant in the suit. The question of title under a grant was involved, the

grant having been made in 1848, four years after the ordinance in question. Is it not extraordinary, indeed inconceivable, that, if during these forty years there had been any such construction of the grant as that for which the City now contends, or such an effect had been given to the ordinance in limiting the grant, this ordinance would not have been brought to the attention of the Court? The manifest inference is, as we believe the fact to be, that the City had never used this ordinance for the purpose for which it is now invoked in attempting to override these grants. The question before the Court of Appeals in the first *Duryea* case involved directly the construction of grants of the class here involved, that is, the title conveyed and the property rights acquired, and there was no suggestion that the ordinance limited the grants or that the permission of the City was required by the ordinance.

Reference is made by the Court of Appeals in its opinion in No. 16 (p. 78) to the second *Duryea* case (*Duryea* v. *Mayor*, 96 N. Y. 477). The Court of Appeals says that in that case the ordinance was called to the Court's attention and it was held that the Common Council had given its consent (*id.*). But we submit that this statement is not adequate. For what did the Court of Appeals say in the second *Duryea* case with respect to the ordinance then brought to its attention? In the first place, the Court set forth in explicit terms what it had decided upon the former appeal, in the first *Duryea* case:

> *"Upon a former appeal in this case to this court, reported in 62 N. Y. 592, it was held that the grantee in this deed took an estate in fee-simple and became thereby invested with all of the rights and privileges of an absolute owner, except as restricted by the*

covenants and reservations contained in it. It was further held that the true construction of the covenants contained therein did not require the previous consent of the common council to authorize the grantees to make and fill up the intermediate spaces between the several streets and avenues therein described, but that such covenant was necessary only to authorize the construction of the streets, wharves and avenues therein provided to be made by the grantee'' (96 N. Y., p. 488, italics ours).

Then in discussing the ordinance, the Court said (*id.*, pp. 494-496):

> "It may very well be doubted whether the construction formerly given by this court to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance.
>
> "The object of this provision was not to cause any interest in the land conveyed to be retained by the grantor, or to postpone the period of enjoyment of its owners, or increase the security of the public creditors, but was obviously designed to enable the grantor to shield itself from the burden of caring for and maintaining the piers, wharves and streets until such time as it should deem the assumption thereof profitable and expedient, and to fix the time and manner of erecting those structures with reference to the introduction therein of water, gas, sewer pipes and other necessary conveniences which naturally fell under the supervision and control of the city authorities. The accomplishment of this object would in no way be materially interfered with by allowing the grantees to proceed with their contemplated work of redeeming their lands from the water and realizing the benefits, which were the sole inducement to them, for its purchase.

"The conduct of the defendant through all of its departments, for a period of upwards of twenty years, has affixed this interpretation upon the clause of the ordinance and deed in question, and it would seem to accord with the true meaning and intent of those instruments. It was a provision originally voluntarily adopted by the city authorities, and was intended for the sole benefit of the municipality. It was not imposed as a limitation upon their authority to convey, but was adopted simply for the purpose of restraining the power of the grantee to throw an untimely burden upon the corporation. When the deed was given, strictly in accordance with the power conferred by the ordinance, a good title was conveyed to the grantees, its object was satisfied, and all subsequent power to enforce the performance of the contract was vested solely in the city. It could release the grantee from his covenants, accept satisfaction, or waive conditions, as could any other party to a contract containing provisions intended solely for his benefit.

"The rule by which this ordinance is to be construed is such as applies to the interpretation of the acts or other legislative bodies, and is that which shall be effectuate the intent of its authors. The reason and object of an act are to be regarded to arrive at its meaning, and while it is not competent to interpret that which has no need of interpretation, or to deny to clear and precise terms the sense which they naturally present, yet when such terms lead to manifest injustice and involve an absurdity, law and equity both require us to give such an effect to the language used as will accomplish the obvious intent of the legislature. (*Watervliet Turnpike Co.* v. *McKeon*, 6 Hill 616; *People* v. *Utica Ins. Co.*, 15 Johns. 358; *Holmes* v. *Casey*, 31 N. Y. 289; *People* v. *Draper*, 15 *id.* 532.)

"The only lands expressly provided to be made by the ordinance are those constituting the piers, wharves, streets and avenues, and since it is unnecessary in order to give the clause in question an office to perform, to extend it to lands outside of such streets, and to create a right unconnected with those clearly intended to be granted, it is in accordance with settled rules of interpretation to limit the effect of general language to the accomplishment of the object undoubtedly intended (*Donaldson* v. *Wood*, 22 Wend. 395). If it be held that the words 'make lands in conformity thereto,' as used in the ordinance, apply only to lands necessary to form the piers, bulkheads and streets, the defendant will not only be protected in all of the rights intended to be secured to it, but the grantee will receive the benefits of his purchase and the deed will be free from objection on account of the apparent repugnancy existing between the interests actually conveyed and those apparently reserved."

In short, the Court of Appeals, in the second *Duryea* case, in construing the ordinance and the grant in relation to the ordinance, clearly indicated its opinion *that the ordinance should be construed in its reference to the permission of the City in the same way that the covenants in the grant should be construed in relation to that permission.* With respect to the City's permission the Court had held in the first *Duryea* case that the covenants did not relate to the intermediate spaces, that is, to the intermediate spaces between the several streets and avenues (which were granted) and in the second case the Court showed that its opinion was that this construction should also be given to the ordinance. The Court pertinently said that the construction should be to carry out the intent and to avoid

"manifest injustice and involve an absurdity." Plainly, the Court felt that the construction for which the City contended did "lead to manifest injustice and involve an absurdity." The Court thought that it was absurd to conclude that the grant, in the light of the ordinance, conveyed the premises only to place all opportunity for their improvement within the arbitrary control of the grantor. This was to destroy the grant, not to carry out its intention. The Court summed up its views on the point by the statement that it was "quite inconceivable" that the parties should purchase land burdened with such a condition. The Court said (96 N. Y., p. 496):

> "It is quite inconceivable that parties should purchase land burdened with the condition that it should be enjoyed only by the permission of the grantor, and a construction having that effect, should only be adopted when no other is possible, or sustainable."

And after saying this, the Court did proceed to say that the City had in fact consented. A stronger declaration of its opinion as to the construction of the grant could hardly have been made.

These expressions of the Court of Appeals in the second *Duryea* case gain in importance when it is remembered that vast amounts had been expended in improving the water front under such grants without any permission by the City, that is, without performance of the condition which was there sought to be read into the grants by reference to the ordinance of 1844. The briefs in the Court of Appeals in the second *Duryea* case stress this point.

In *Williams* v. *Mayor*, 105 N. Y. 419, the City's grants were made in 1858 and 1859, after the act of 1857 which fixed a bulkhead line or line of solid filling. After referring to that act, the Court said (p. 433):

> "We are able now to see what the rights of the city were when it conveyed to Williams & Towle. The city owned the upland. In front of it the harbor commissioners' line had been established. The erection of a new wharf on that line was desired. Its construction would shut in and destroy the old wharf on the old west line of Thirteenth avenue, and require a solid filling which the city had a right to make, and having made, would own and possess. It had a further right as against the State; an easement for the approach of vessels over the lands of the State under water, in front of the harbor commissioner's line, whenever a new wharf should be built upon that line. All these rights it conveyed to Williams & Towle and vested every one of them in them. It had the power to convey them (*Langdon* v. *Mayor, etc., supra*). It did convey them. Its deeds cover the open space between the avenue bulkhead and the harbor commissioner's line, and make that the west or outer line of the grant. They were made and accepted upon an understanding of the city's rights precisely as we have held them to exist. One of them described the property thus: 'All that certain water-lot or vacant ground and soil under water, *to be made land* and gained out of the Hudson, or North river, or Harbor of New York, and so much thereof as has already been made and gained,' etc. The municipal authorities either at that date understood their rights as we do, or else perpetrated a deliberate fraud upon an unsuspecting purchaser."

In *Mayor* v. *Law*, 125 N. Y. 380, the rule of the *Duryea* cases was reaffirmed. The Court said (p. 391):

> "The grantee became the absolute owner of the land between the streets—the land granted, and that he could fill up whenever he chose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up (*Duryea* v. *Mayor, supra*)."

There is no qualification in this statement, made seven years after the second *Duryea* case, with respect to the ordinance of 1844. There has been nothing inconsistent with this plain ruling, until the opinion of the Court of Appeals in No. 16. We think, therefore, that despite the language of the opinion in the case under review that the repeated rulings of the State Court themselves may be invoked as to the true construction of these grants, and that is, that there was no reservation of an arbitrary power in the City to withhold permission to make solid filling in the premises conveyed, but that the grantees had the right to proceed with this improvement without the consent of the City and by virtue of their title as owners in fee. In addition, we have the actual construction of the grants to this precise effect in the decision of the State Court in No. 15.

But, apart from this construction, it is submitted that this Court which will construe the grant for itself and that the invocation of the ordinance is in derogation of the grant. A construction involving such a condition repugnant to the grant is not favored in the law. On the one hand the City conveys title in fee, purports to grant all the title it has and all the State had (Laws of New York, 1837, Chap. 182), demands covenants from the grantees, de-

mands the payment of taxes, and on the other hand insists that it has an absolute reserved right to prevent any beneficial use of the property conveyed. It strips the fee of all its beneficial incidents, and then says sardonically that the grantees only took a "naked fee". The condition alleged makes the grants worthless, so completely worthless that as the Court of Appeals said in the second *Duryea* case, it is "quite inconceivable" that any purchaser would knowingly take title with such a condition. The construction limiting the grant by reference to the ordinance so as to require the City's permission as a condition for any improvement of the premises granted and paid is wholly untenable.

The ordinance itself, however, as has been pointed out, only requires permission of the Common Council. The plaintiffs' grants made by the Common Council must be deemed to contain that permission as they contain explicit covenants as to what building or making of land, that is within the excepted streets, shall require any further permission. These covenants, as uniformly held by the State Court, only apply to the excepted streets. After the grants, subsequent to the ordinance, were made by the Common Council itself, defining their terms and the scope of such permission as should be required, the ordinance of 1844 had no remaining vitality or effect with respect to the grants. It was superseded by the terms of the grants themselves.

If, however, it can be said that any permission on the part of the City is required in relation to these improvements, that permission could go only to that sort of police supervision on the part of the City which is appropriate in all building operations, excavations or improvements within the City limits so as to safeguard life and property from unnecessary injury.

The purpose of the petition in the instant case was to secure this police permit without which nothing can be done within the borders of the City no matter how complete the ownership of property. This permit was denied and in order to deny it a condition was read into the grants repugnant to the grants, and, as it seems to us, wholly indefensible.

Fourth: *The effect given by the State Court to the legislation impairing plaintiffs' grants.*

It is not disputed that if there is no legislative action subsequent to the grants to which effect is given by the determination of the State Court the decision is not reviewable here under the contract clause. But it is equally clear under the authorities above cited that if the consequence of the decision of the State Court is to give effect to a subsequent enactment impairing the obligations of the grants, the decision is none the less reviewable because the State Court attempted to support it by holding that there was no contract to be impaired, or that a condition of the contract had not been performed, or that the contract had become inoperative. If this Court finds that there is a contract; that the condition sought to be read into it by the State Court should not be read into it; that the contract is operative; then the remaining question is simply whether the determination of the State Court does give effect to subsequent legislation causing impairment of the contract.

In this case that effect is clear. The City has established a new water front plan in 1916, pulling the bulkhead line inshore 100 feet from the Federal bulkhead line. The only reason for refusing the permit for which the plaintiffs ask in order that they might proceed with their improve-

ments was that the City's new plan stood in the way. The determination of the State Court upholds the City in its refusal. It makes the new plan secure. It gives the City complete opportunity to go forward with it and establish the new bulkhead line. The establishment of that line impairs the plaintiffs' grants. The determination is just as effective for this purpose as any action could possibly be. That new plan of the City is legislative in character. The City under State authority lays down the line beyond which there shall be no solid filling. That is a legislative rule. It is elementary that it makes no difference by what sort of legislation the contract may be impaired; whether it is a statute of the state legislature or an ordinance or action by the City under the authority granted by the State.

Williams v. *Bruffy*, 96 U. S. 176, 183.
New Orleans Water Works Co. v. *Louisiana Sugar Co.*, 125 U. S. 18.

The Greater New York Charter is legislation subsequent to the grants. In making its new plan, the City acted under the provisions of the Charter and laid down a legislative rule covering its permits. That is legislative action subsequent to the grants. To this action effect is given and it impairs the obligations of the plaintiffs' contract and deprives them of their property without due process of law.

The Appellate Division, we submit, decided the case correctly and in accordance with the plaintiffs' constitutional rights in holding that the *mandamus* for the permit should issue, and allowing time to the City to condemn the property if it saw fit to do so in order to carry out its plan.

The judgment in No. 15 and the final order in No. 16 should be reversed and the cases remanded for proceedings not inconsistent with the opinion of this Court which it is submitted should sustain the plaintiffs' property rights under their deeds and deny the authority of the City to interfere therewith unless and until just compensation is made.

Respectfully submitted,

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